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Semantic Cover for Age Discrimination: Twilight of the ADEA

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SEMANTIC COVER FOR AGE DISCRIMINATION: TWILIGHT OF THE ADEA

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I. INTRODUCTION

In 1967, Congress recognized that the number of displaced older people in the workforce was growing, due in large part to the problems older people were encountering in finding new jobs once displaced from a job of many years.[1] In these times of corporate downsizing, older workers are particularly vulnerable to bearing the brunt of workforce reductions due to the fact that they are often "paid a little more because they have been with the company a little longer."[2] As a result, since 1967 older workers have been protected from discrimination based on their age by the Age Discrimination in Employment Act (ADEA).[3] From the time that the ADEA became effective until recently, if an employer used criteria such as high salary, seniority, tenure, or experience to make unfavorable employment decisions, courts either found that the

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1. 29 U.S.C. § 621(a) (1988) states in part:

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave . . . .

2. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1209 (7th Cir. 1987), *on remand*, 692 F. Supp. 987 (N.D. Ind 1988).

3. 29 U.S.C. §§ 621-634 (1988).

employer was discriminating per se or required the employer to justify the use of such factors that inevitably correlate with age.[4] Now, however, a confluence of Supreme Court decisions, appellate court decisions, and legislative action and inaction allows employers to make decisions based on age-correlated factors with virtual impunity. Today, courts frequently decide age discrimination cases involving the admitted use of age-correlated factors, which formerly were sure winners for the plaintiff, on summary judgment in favor of the defendant.[5] Even if a plaintiff can produce other evidence of discrimination in addition to the age-correlated factor, including evidence previously characterized as the "smoking gun," plaintiffs often suffer summary judgment.[6] If this trend continues, older workers will find themselves in the same position they occupied in 1967, when Congress recognized that "the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave."[7]

This Article examines the factors that have contributed to the current state of the law governing age discrimination in employment. One such factor is the Civil Rights Act of 1991, in which Congress expanded almost all rights protected by federal civil rights statutes.[8] However, Congress failed to include the ADEA in the substantive changes made by the Civil Rights Act of 1991, leaving the ADEA at the mercy of the Supreme Court's less than generous pre-1991 employment discrimination decisions. These decisions include, most notably, *Wards Cove Packing Co. v.*

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4. See *infra* note 105 for a discussion of cases in which courts found the employer's use of age-correlated factors violative of the ADEA.

5. *See infra* notes 112-14.

6. See *infra* note 54 for a discussion of recent cases in which the defendant was granted summary judgment despite proof of derogatory comments about the plaintiff's age, and evidence of an age-related criterion.

7. 29 U.S.C. § 621(a)(3) (1988).

8. 29 U.S.C. § 626 (1990 & Supp. 1994); *see* David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, 8 LAB. LAW. 849, 850-51 (1992) (debating whether the 1991 Act expanded or restored the 1964 Civil Rights Act).

Atonio.[9] The *Wards Cove* decision, because it substantially limited a plaintiff's ability to prove a disparate impact case, became the single greatest impetus to the 1991 Civil Rights Act.[10] The 1991 Act superseded *Wards Cove* for purposes of Title VII actions, but not specifically for the ADEA.[11]

The Supreme Court's recent decision in *Hazen Paper Co. v. Biggins*[12] further exacerbated the deleterious effect of *Wards Cove* on a plaintiff's ability to prove a claim under the ADEA. Before *Hazen Paper*, the majority of lower courts had determined that, in most cases, employers were discriminating intentionally based on age if they used unjustified age-correlated criteria such as seniority or high salary to make adverse employment decisions.[13] *Hazen Paper* approved the use of an age-correlated criterion as a "factor other than age," which the employee must prove as a pretext for discrimination.[14] In most lower courts, plaintiffs still can prove that

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9. 490 U.S. 642 (1989) (superseded in part by statute).

10. *See* Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 924 (1993); Niall A. Paul, *Wards Cove Packing Co. v. Atonio: The Supreme Court's Disparate Treatment of the Disparate Impact Doctrine*, 8 HOFSTRA LAB. L.J. 127 (1990). See Mack A. Player, *Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio*, 17 FLA. ST. U. L. REV. 1 (1989), for the view that *Wards Cove* "should not dramatically alter the outcome" in disparate impact cases, except in close cases. *Id.* at 46. Professor Player's conclusion is that *Griggs* is not dead but only wounded. *Id.* Compare Professor Belton's view that *Wards Cove* dismantled the *Griggs* disparate impact theory, resulting in one theory of discrimination requiring intentional discrimination. Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223 (1990).

11. *See infra* notes 179-89 and accompanying text.

12. 507 U.S. 604 (1993).

13. *See infra* note 105 and accompanying text.

14. 507 U.S. at 608.

> [T]he courts of appeals repeatedly have faced the question whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age. . . . We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age.

such age-correlated factors are discriminatory, using the disparate impact model of proof. However, in *Hazen Paper* some members of the Court expressed doubt whether the disparate impact theory applies at all in age discrimination cases.[15] Indeed, a majority of the Court noted that the case did not involve disparate impact, and that the Court had not decided whether disparate impact applies to the ADEA.[16]

Because Congress failed to apply the disparate impact provisions of the 1991 Civil Rights Act to the ADEA, the Supreme Court may be poised to go one step further than *Hazen Paper* and expressly rule that the ADEA does not countenance a disparate impact cause of action. The result of such a decision would be startling: employers could use unjustified age-correlated factors to rid their workforces of older employees. For example, an employer could eliminate all high salaried employees or all employees with more than ten years of service. The only limitation would be the

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Id. The *Hazen* Court based this conclusion upon the premise that Congress' intention in enacting the ADEA, preventing the use of "inaccurate and stigmatizing stereotypes," did not require that decisions motivated by factors correlated with age be unlawful. *Id.* at 610.

15. Justice Kennedy's concurrence, which was joined by Chief Justice Rehnquist and Justice Thomas, cautions that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII of the Civil Rights Act of 1964." *Id.* at 618. The concurring Justices also noted that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Id.*

Although the Court's unanimous opinion specifically states that it does not determine whether the disparate impact doctrine may be used in cases arising under the ADEA, Justice O'Connor's opinion for the Court indicates that the mission of the ADEA is fulfilled without the aid of the "disparate impact" theory. After explaining the disparate treatment theory as applied in ADEA cases, she states, "Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA." *Id.* at 610.

Compare *infra* text accompanying note 130 with *infra* text accompanying note 253 for a discussion of the lower courts' holdings regarding disparate impact under the ADEA before and after *Hazen Paper*.

16. 507 U.S. at 610. The Court never reached the disparate impact theory because the employee "claim[ed] only that he received disparate treatment." *Id.*

employee's ability to show pretext, which would be a difficult task.[17] Moreover, even if disparate impact does apply to the ADEA, proving a disparate impact will be more difficult because Congress failed to supersede *Wards Cove* in regard to ADEA actions.

A further complicating factor is the ADEA's defense of "reasonable factor other than age" (RFOA).[18] Before *Hazen Paper*, a plaintiff could make a good argument that an age-correlated factor was not an RFOA, unless the employer could prove a reasonable basis for the use of such a factor. Although the Supreme Court did not explicitly mention the defense of RFOA in *Hazen Paper*, the decision leaves little room to interpret the RFOA defense as meaning anything except "*any* factor other than age."[19] Indeed, lower courts are interpreting *Hazen Paper* very broadly.[20] Furthermore, the courts may ultimately determine that RFOA is the defense to disparate impact cases, rather than "business necessity," as some commentators suggest. If an age-correlated factor does not have to be justified to serve as an RFOA, disparate impact cases will be precluded.[21]

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17. *See* Melissa A. Essary, *The Dismantling of McDonnell Douglas v. Green: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385, 403 (1994).

18. 29 U.S.C. § 623(f) (1988 & Supp. V 1993).

19. *See* 507 U.S. at 611. ("When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is."). See Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 538 (1995), for the view that *Hazen Paper* did not implicate the RFOA defense.

20. *See infra* text accompanying notes 112-16.

21. *See infra* notes 147-73 (discussing business necessity); *see infra* notes 255-67 and accompanying text (discussing the defense of RFOA). In addition to the Supreme Court's decisions in *Hazen Paper* and *Wards Cove* and Congress' failure to include the ADEA in the 1991 Civil Rights Act, two other Supreme Court cases make age discrimination cases harder for plaintiffs to win: St. Mary's Honor Ctr. v. Hicks, 506 U.S. 1042 (1993), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In *St. Mary's Honor Ctr.*, the Supreme Court held that proof that the defendant lied about the reason that adverse action was taken against the plaintiff is not necessarily sufficient to prove discrimination. *See infra* note 49.

In Part II, this Article offers a general explanation of the ADEA. Part III explains theories of discrimination generally and in relation to the ADEA. Part IV discusses disparate treatment under the ADEA and the defense of "reasonable factors other than age," before and after *Hazen Paper*. Part V discusses the applicability of the disparate impact model of proof to the ADEA before and after the Civil Rights Act of 1991; whether the RFOA defense precludes proof of disparate impact; and, if not, whether RFOA or business necessity is the defense in disparate impact cases under the ADEA. Finally, Part VI suggests an interpretation of the ADEA that will comport with congressional intent in enacting the ADEA: to eliminate age discrimination while protecting employers from employing people who are no longer able to perform the job because of the effects of aging or some reason unrelated to their age.

II. THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Congress passed the ADEA to prohibit discrimination based on age against persons aged forty to sixty-five.[22] The upper age limit was raised in 1978[23] and then removed altogether in 1986.[24] Because

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In *Celotex*, by reducing the moving party's initial burden, the Supreme Court made summary judgment for the defendant more likely to be granted. *See* JACK H. FRIEDENTHAL, CIVIL PROCEDURE 445 n.23 (2d ed. 1993). In the same year, the Supreme Court also decided two other cases that make a grant of summary judgment more likely: Anderson v. Liberty Lobby, 477 U.S. 242 (1986), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). "Too many lower courts have interpreted the trilogy as a license to weigh evidence, draw inferences in favor of the defendant when it moves for summary, assess witness credibility and require plaintiffs to prove their cases at the summary judgment stage." Ann C. McKinley, *Credulous Court and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 255-56 (1993).

22. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607.

23. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, §§ 3(a), 12(a), 92 Stat. 189.

24. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342.

the wording of the prohibitions against age discrimination in the ADEA was taken word-for-word from Title VII of the Civil Rights Act of 1964,[25] the ADEA now ostensibly provides the same basic protections from discrimination based on age for people over forty[26] that Title VII provides based on race, sex, religion, color, and national origin.[27] The remedial provisions of the ADEA were

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25. Lorillard, Inc. v. Pons, 434 U.S. 575, 584 (1978). Congress rejected age as a basis for discrimination under Title VII but directed the Secretary of Labor to study the problem of age discrimination. *See* 110 CONG. REC. 2596-99, 9911-13, 13,490-92 (1964). For the actual report, see U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965), and Research Materials, *id.* For a discussion of the report, see Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 235, 286-306 (1990); ALFRED W. BLUMROSEN, INTERPRETING THE ADEA: INTENT OR IMPACT, IN AGE DISCRIMINATION IN EMPLOYMENT ACT: A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS 68 (M. Lake ed. 1982). Professors Kaminshine and Blumrosen have excellent sections in their works dissecting the Secretary's report for evidence of whether the ADEA was intended to prohibit practices that have a disparate impact; each coming to the opposite conclusion. Kaminshine, *supra*, at 235; BLUMROSEN, *supra*, at 73.

26. The subject of this Article is that the protections appear to be the same, but may in practice be different. *See infra* note 27.

27. The ADEA provides:

It shall be unlawful for an employer:

(1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *age.*

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *age.*

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(a)(1)-(2), 81 Stat. 602, 603 (1967) (codified as amended in scattered sections of 29 U.S.C.).

Title VII provides:

(a) It shall be *an* unlawful *employment practice* for an employer –

(1) to fail or refuse to hire or to discharge any individual, or

drawn from the Fair Labor Standards Act and provide for liquidated damages for wilful violations.[28]

In addition to the bona fide occupational qualification (BFOQ) and seniority defenses also available under Title VII,[29] Congress added other defenses to the ADEA that were not found in Title VII. These provide an exception for any action that the employer takes based on "reasonable factors other than age" or pursuant to a

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otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *race, color, religion, sex, or national origin;* or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *race, color, religion, sex, or national origin.*

Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1989 & Supp. 1995).

The italicized provisions indicate the differences between Title VII and the ADEA. The only real difference between the two statutory provisions cited above is that the ADEA does not mention applicants, although discriminatory hiring is forbidden. The word "applicants" was added to Title VII in 1972 after Griggs v. Duke Power Co., 401 U.S. 424 (1971), and after the ADEA to "perfect[] the Title VII provisions dealing with . . . apprenticeship training." H.R. REP. NO. 238, 92d Cong., 2d Sess. 19-20 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2155-56.

28. Age Discrimination in Employment Act, codified at 29 U.S.C. § 626(b) (1990). In addition, the statute of limitations was extended from two to three years for a wilful violation. *Id.* This provision was eliminated by the Civil Rights Act of 1991, which requires the plaintiff to file suit within 90 days of notice that the EEOC has terminated its proceedings. Civil Rights Act of 1991, 29 U.S.C. § 626 (1990 & Supp. 1995); *see* Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1106 (1993). Congress left the substantive provisions of the ADEA, which were changed for Title VII, unchanged for the ADEA. *See infra* notes 179-89.

29. 42 U.S.C. § 2000 e-2(e), (h) (1988). The BFOQ defense is not absolute under Title VII, but only applies to sex, religious, and national origin discrimination. 42 U.S.C. § 2000e-2(e) (1988).

There are defenses under Title VII that are not contained in the ADEA, such as action taken pursuant to a "merit system or a system which measures . . . quantity or quality of production . . . [or a] professionally developed ability test." 42 U.S.C. § 2000e-2(h) (1988).

bona fide benefit plan, as well as discipline or discharge for good cause.[30]

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30. Section 623(f) provides:

It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c) or (e) of this section –

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan –

where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

29 U.S.C. § 623(f) (1988 & Supp. V 1993); *see* Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable*

Until the Civil Rights Act of 1991, courts usually interpreted the ADEA consistently with Title VII, an approach that the courts considered appropriate and desirable.[31] Because of the changes in the law brought about by the 1991 Act, however, the ADEA is probably now governed by law that was superseded for Title VII but left intact for the ADEA.[32]

III. GENERAL THEORIES OF DISCRIMINATION

The Supreme Court has developed two theories of discrimination under Title VII: disparate treatment[33] and disparate impact.[34] Courts commonly apply both theories to the ADEA.[35] Disparate treatment occurs when the employer intentionally discriminates against an employee based on race, sex, religion, color, or national origin.[36] Courts apply the disparate impact theory to employment criteria that eliminate more persons of a certain protected class than others.[37] Proof of intent to discriminate is unnecessary in a disparate impact case.[38] Rather, the proof is based on statistical

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Factors Other Than Age Exception, 66 B.U. L. REV. 155, 177-80 (1986).

31. *See* Western Air Lines v. Criswell, 472 U.S. 400, 411-13, 416-17 (1985); Monce v. City of San Diego, 895 F.2d 560, 561 (9th Cir. 1990); *cf.* Lorillard, Inc. v. Pons, 434 U.S. 575, 584 (1978). *See* MACK A. PLAYER ET AL., EMPLOYMENT DISCRIMINATION LAW 571 (1990); Kaminshine, *supra* note 25, at 230-31 (1990). The courts universally apply the disparate treatment theory to the ADEA, *see infra* text accompanying notes 46-65; whether the disparate impact theory applies to the ADEA is less certain. *See* discussion *infra* part V.C.

32. *See* Eglit, *supra* note 28, at 1103-04.

33. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

34. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

35. *See supra* note 31.

36. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

37. Griggs v. Duke Power Co., 401 U.S. 424 (1971). See Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799 (1985), for a good discussion of the difference between the two theories.

38. *Griggs*, 401 U.S. at 432.

analysis of the impact of the employer's employment criteria on a protected class.[39]

In the early days of Title VII, courts interpreted its provisions broadly.[40] As time passed and courts became more conservative, interpretations of the Act became more restrictive.[41] After the Supreme Court rendered a decision significantly limiting the

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39. *See* BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 98-102 (2d ed. 1983) (discussing importance of statistics in class action suits).

40. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Harold S. Lewis, Jr., *The Civil Rights Act of 1991 and the Continued Dominance of the Disparate Treatment Conception of Equality*, 11 ST. LOUIS U. PUB. L. REV. 1, 1-2 (1992).

41. *See* Judith J. Johnson, *Rebuilding the Barriers: The Trend in Employment Discrimination Class Actions*, 19 COLUM. HUM. RTS. L. REV. 1, 54-58 (1987); Lewis, *supra* note 40, at 2.

Because of restrictive interpretations, plaintiffs had difficulty proving violations. *See generally* David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 971 & n.327 (1993). In addition, the equitable remedies of backpay and reinstatement were the only remedies allowed for Title VII violations. 42 U.S.C. § 2000e-5(g) (1988). Plaintiffs had to mitigate backpay, and because few desired reinstatement, the remedies were fairly negligible. See Caryn L. Lilling, Note, *The Civil Rights Act of 1991: An Examination of the Storm Preceding the Compromise of America's Civil Rights*, 9 HOFSTRA LAB. L.J. 215, 250-52 (1991), for a discussion of remedies in cases of intentional discrimination. The Act did provide for attorney's fees. 42 U.S.C. § 2000e-5(k) (1988). Plaintiffs did not have a sufficient incentive to enforce their rights, and employers did not have a sufficient disincentive to refrain from discriminatory acts. Oppenheimer, *supra*, at 934-35. Further, because the remedies were equitable, the plaintiff was not entitled to a jury trial. *See, e.g.*, Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975), *superseded by* 42 U.S.C. § 1981a(c) (Supp. V 1993).

Another consideration served as an impetus for change, especially in the remedial provisions of Title VII: while plaintiffs alleging national origin or racial discrimination could sue under 42 U.S.C. § 1981 and Title VII, and recover compensatory and punitive damages, plaintiffs alleging sex and religious discrimination were limited to Title VII equitable relief. 42 U.S.C. § 1981 (1988); *see* Cathcart & Snyderman, *supra* note 8, at 857. Proponents of the equalization of remedies in Title VII and § 1981 cases also pointed out that often the plaintiff suffers no loss of pay or position in a sexual harassment case. *Id.* at 857-58. Consequently, the plaintiff would be afforded no relief, even if she prevailed.

disparate impact model under Title VII,[42] Congress began working to overturn that ruling, as well as other restrictive rulings.[43]

The Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*,[44] limiting the disparate impact theory as well as decisions that affected the disparate treatment theory,[45] prompted the passage of the 1991 Civil Rights Act. The following is an in-depth discussion of the two theories of discrimination and how they apply to the ADEA, beginning with the disparate treatment theory.

IV. DISPARATE TREATMENT

Case law provides four ways to prove disparate treatment under Title VII, many of which also apply to the ADEA. The first involves a showing of circumstantial evidence of disparate

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42. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (superseded in part by statute).

43. The other significant rulings were EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (Title VII does not apply to United States citizens working for American companies outside the United States); Patterson v. McLean Credit Union, 491 U.S. 164, 178-79 (1989) (because § 1981 applies only to the formation of the contract relationship, not to the breach of its terms; discrimination in hiring, for example, is actionable under § 1981, but racial harassment relating to conditions of employment is not); Lorance v. AT&T Tech., 490 U.S. 900, 911 (1989) (statute of limitations for attacking a facially neutral and facially applied seniority system begins to run when the system is adopted); Martin v. Wilks, 490 U.S. 755, 759-61 (1989) (allowing persons who could have intervened before the final approval of consent decrees providing goals for promotion of blacks and setting forth an extensive remedial scheme to attack the decrees later); Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (employer who takes gender into account in making an employment decision shall not be liable if she proves that she would have made the decision even without taking gender into account). There were other cases, not eventually overruled by the 1991 Act. *See* Lilling, *supra* note 41, at 217-19.

Congress passed the Civil Rights Act of 1990. The President vetoed the legislation, and Congress failed to override the veto by one vote. *Id.* at 216-17. The result was the Civil Rights Act of 1991, a somewhat weakened version of the Civil Rights Act of 1990. *See* Cathcart & Snyderman, *supra* note 8, at 870.

44. 490 U.S. 642 (1989) (superseded in part by statute).

45. *See supra* note 43; Oppenheimer, *supra* note 41, at 935.

treatment for which the Court constructed a model of proof in *McDonnell Douglas Corp. v. Green.*[46] The plaintiff must show that (1) he was a member of a protected class; (2) "that he applied and was qualified for a position for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected;" and (4) that the employer continued to seek applicants with the plaintiff's qualifications.[47] The Court noted in *McDonnell Douglas* that requiring the plaintiff to eliminate the most common causes for rejection, lack of qualifications and unavailability of a position, was sufficient to establish a prima facie case of intentional discrimination, thereby requiring "the employer to articulate a legitimate, nondiscriminatory reason" for rejecting the plaintiff.[48]

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46. 411 U.S. 792 (1973).

47. *Id.* at 802. The Court noted that there are other ways to prove a prima facie case. *Id.* at 802 n.13. For a good discussion of burdens of proof, see Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1235-40 (1981).

Many courts required more proof for a prima facie case of age discrimination. *Id.* For example, the plaintiff had to have been replaced by a person outside the protected age group. *See, e.g.*, Carpenter v. Western Credit Union, 62 F.3d 143, 145 (6th Cir. 1995); O'Connor v. Consolidated Coin Caterers Corp., 56 F.3d 542, 546 (4th Cir. 1995), *rev'd and remanded*, No. 95-364, 1996 WL 14564 (U.S. April 1, 1996); Shore v. A.W. Hargrove Ins. Agency, 873 F. Supp. 992 (E.D. Va. 1995); Blistein v. St. John's College, 860 F. Supp. 256 (D. Md. 1994), *aff'd*, 74 F.3d 1459 (4th Cir. 1995); Adams v. Dupont Merck Pharmaceutical Co., 1994 WL 702606 (E.D. Pa. 1994). *But see* Collier v. Budd Co., 68 Fair Empl. Prac. Cas. (BNA) 1435 (7th Cir. 1995) (court found prima facie case based on plaintiff's evidence that employer intended to replace him with younger worker but was unable to do so). The Supreme Court recently decided, however, that the plaintiff does not necessarily have to prove that he was replaced by a person outside the protected age group in order to prove a prima facie case. The court determined that the proper solution to the problem lies not in making an utterly irrelevant factor [replacement by a person outside the protected age group] an element of the prima facie case, but rather in recognizing that the prima facie case requires 'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion.'" O'Connor v. Consolidated Coin Caterers Corp., No. 95-364, 1996 WL 14564, at *3 (U.S. April 1, 1996).

48. *McDonnell Douglas*, 411 U.S. at 802; *see* SCHLEI & GROSSMAN, *supra* note 39, at 497-98.

Once the employer produces evidence of a legitimate, nondiscriminatory reason, the plaintiff bears the burden of persuading the court that the reason given by the employer was not the true reason for the employer's action, but rather was a pretext for discrimination.[49] The Court later clarified, in *Texas Department of Community Affairs v. Burdine*,[50] that the employer must produce evidence of a reason for rejecting the plaintiff, but need not persuade the court that it was motivated by that particular reason. The Court stated that the plaintiff's initial burden was not onerous and that the burden of persuasion remains on the plaintiff at all times.[51] The courts usually apply the allocation of proof of *Burdine-McDonnell Douglas* in age discrimination cases.[52]

A second model of proof of intentional discrimination recog-

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49. *McDonnell Douglas*, 411 U.S. at 804; *see* Michael J. Zimmer & Charles A. Sullivan, *The Structure of Title VII Individual Disparate Treatment Litigation: Anderson v. City of Bessemer City, Inferences of Discrimination, and Burdens of Proof*, 9 HARV. WOMEN'S L.J. 25, 41 (1986). At one time the lower courts held that this presumption was irrebuttable. The courts assumed that if the employer lied about the reason, the employer must have intentionally discriminated against the plaintiff as a matter of law. *See also* Essary, *supra* note 17, at 403.

The Supreme Court has recently "reinterpreted" its decisions in this regard in St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). In *Hicks*, the Court determined that the trier of fact may resolve the ultimate issue of discrimination *vel non* based on its disbelief of the employer's reason for its action, but that such disbelief does not necessarily satisfy the plaintiff's ultimate burden of proving discrimination. The plaintiff must prove not only that the employer's reasons were untrue, but also that they were a pretext for discrimination. *Id.* at 518-20 (discussing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)). The Court was apparently recognizing the unfortunate reality that employers may lie about the reasons for their decisions for a variety of reasons, some of which are not discriminatory.

An employer may lie because his real reason is ridiculous or arbitrary, but not actually discriminatory. The proper step at this point should be to put the burden of persuasion on the employer to prove the real reason, rather than putting an additional, and in many cases impossible, burden on the employee.

50. 450 U.S. 248, 253 (1981).

51. *Id.* (citing Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978).

52. *See* SCHLEI & GROSSMAN, *supra* note 39, at 497.

nized under Title VII and the ADEA involves cases in which the plaintiff can produce direct evidence of intentional discrimination.[53] In such cases, the burden of persuasion shifts to the employer to prove that it did not discriminate.[54]

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53. Trans-World Airlines v. Thurston, 469 U.S. 111, 121 (1985); Lee v. Russell Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982). *Thurston* was an age discrimination case, but the Court noted that Title VII principles were applicable. 469 U.S. at 121.

"Direct Evidence is that evidence which, if believed, 'establishes discriminatory intent without inference or presumption.'" Dickson v. Amoco Performance Prod., 910 F. Supp. 629, 634 (N.D. Ga. 1994) (citing Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1226 (11th Cir. 1993)).

54. *See, e.g.*, Hill v. Metropolitan Atlanta Rapid Transit Auth., 841 F.2d 1533, 1539 (11th Cir.), *modified on other grounds*, 848 F.2d 1522 (11th Cir. 1988); Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984). The courts limit direct evidence cases to cases in which the direct evidence is more than "isolated and ambiguous." Carpenter v. Western Credit Union, 62 F.3d 143, 145 (6th Cir. 1995). The *Carpenter* case is one of several recent ADEA cases in which, although it appears that the plaintiff had found the usually unavailable admission of discriminatory intent by the employer, the so-called "smoking gun," the court decided that the evidence was insufficient to treat the case as a direct evidence case. In fact, in *Carpenter*, the court granted summary judgment in favor of the defendant despite the company president's statement that the discharge of the plaintiff and another employee was "purely economical, they were the two oldest employees here." *Id.* at 144; *see* cases cited *infra* note 114.

Similarly, statements by supervisors, including the supervisor who recommended the plaintiff's discharge, to the effect that they wanted a "'younger and cheaper' engineer" and were "'going to get rid of the older employees with the higher salaries,'" were "primarily indicative of a desire to save money by employing persons at lower pay" and insufficient to shift the burden of persuasion. Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1218 (5th Cir. 1995).

Statements made by the supervisor shortly before he discharged the plaintiff that the plaintiff was "'too damn old for this kind of work'" and "'it's about time we got some young blood in this company,'" were insufficient to avoid summary judgment. O'Connor v. Consolidated Coin Caterers Corp., 56 F.3d 542, 549 (4th Cir. 1995), *rev'd and remanded*, No. 95-364, 1996 WL 14564 (U.S. April 1, 1996) (reversal based on unrelated issue).

In Woroski v. Nashua Corp., 31 F.3d 105 (2d Cir. 1994), the plant manager responsible for terminating the plaintiffs had on

many occasions [stated] that the "salary workforce[ ] was older, had

The third type of intentional discrimination case is characterized by mixed motives and occurs when the employer is motivated by legitimate and illegitimate factors.[55] Prior to the 1991 Civil

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been around too long, made too much money and enjoyed too many benefits" and that "what this company needed was new younger people, perhaps people out of college . . . that were younger, more aggressive, hungrier, that would have come and not had six weeks vacation . . . and in fact could be hired for, you know, half or 70% of what these people . . . enjoy."

Id. at 108. The court nevertheless affirmed the summary judgment in favor of the defendant.

In Caponigro v. Navistar Int'l Transp. Corp., 1995 WL 238655 (E.D. Ill. 1995), despite the defendant's "written observation that an older work force meant higher medical costs," the court found there was no inference of discrimination, because an employer may base employment decisions on such costs without violating the ADEA. *Id.* at *8.

In another case, the plaintiff charged age, national origin, and sex discrimination. The plaintiff's supervisor had said on various occasions that the plaintiff did not fit into the company image because she was a Filipino, and that a "male would be more appropriate because Alzona [the plaintiff] had a female tendency to be 'out of sorts' and women couldn't be trusted in key business roles because of physiological shortcomings." Alzona v. Mid-States Corporate Fed. Credit Union, No. 92 C 8244, 1995 WL 134767, at *6 (N.D. Ill. 1995). These statements, in addition to circumstantial evidence of age discrimination, and the fact that the plaintiff was replaced with a young American male, were sufficient to defeat the defendant's motion for summary judgment on all three claims. *Id.* at *7.

55. *See* Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion), is the best case of mixed motives. In that case, the plaintiff proved that the defendant had considered her gender in its decision to deny her partnership, because several partners made comments to the effect that she was too masculine. *Id.* at 235. The Supreme Court analyzed the case as an instance of mixed motives, *id.* at 232-58, because the employer said it would have made the same adverse decision based on legitimate reasons. A four-Justice plurality, while admitting that proof of sex stereotyping was evidence of gender discrimination, *id.* at 250-51, 258, remanded the case to allow the employer to prove that it would have made the same decision based on permissible factors, which, at the time, would have absolved it from liability. On remand, the defendant was unable to prove it would have made the same decision without considering the plaintiff's gender. 737 F. Supp. 1202 (D.D.C.), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

Rights Act, according to the Supreme Court in *Price Waterhouse v. Hopkins*,[56] the employer could avoid liability by proving that it would have made the same decision for legitimate reasons, even though the plaintiff's protected status was a contributing factor.[57] After the 1991 Act, if the employee shows that his protected status was a substantial factor in the employer's decision, the employer has violated Title VII and can only avoid damages and reinstatement by showing that it would have made the same decision without considering the prohibited factor.[58] The 1991 Act did not

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56. 490 U.S. 228 (1989). A four-Justice plurality of the Court voted to remand the case for a determination of whether the employer would have made the same decision for legitimate reasons. *Id.* at 258. Before the 1991 Civil Rights Act, the courts generally assumed that *Price Waterhouse* applied to ADEA cases. *See, e.g., Mooney*, 54 F.3d at 1216-19 (case arose before the 1991 Act); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095-96 (3d Cir. 1995); Glover v. McDonnell Douglas Corp., 981 F.2d 388 (8th Cir. 1992), *cert. granted and judgment vacated by* 114 S. Ct 42 (1993) (remanded for consideration in light of *Hazen*); Beshears v. Asbill, 930 F.2d 1348 (8th Cir. 1991). See Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir.), *cert. denied*, 506 U.S. 826 (1992), for an excellent discussion of mixed motive cases in the context of age discrimination in an action under New York Human Rights Law, N.Y. EXEC. LAW §§ 290-301 (1982 & Supp. 1992), which has been interpreted as being identical to the ADEA. *But see Mooney*, 54 F.3d at 1216-19 (case arose before the 1991 Civil Rights Act holding that a mixed motive instruction was not appropriate because of the lack of direct evidence).

57. 490 U.S. at 258 (1989). This part of the Supreme Court's decision in *Price Waterhouse* was one of the causes of the 1991 Civil Rights Act. *See* Cathcart & Snyderman, *supra* note 8, at 849.

58. 42 U.S.C. § 2000e-2, as amended by the 1991 Civil Rights Act, provides in pertinent part:

> (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices.
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (1995).

42 U.S.C. § 2000e-5(g), as amended by the 1991 Act, provides in pertinent part:

apply specifically to the ADEA, so it is likely that *Price Waterhouse* is still applicable to ADEA cases.[59]

A fourth type of proof under Title VII governs a case in which intentional discrimination is a "pattern or practice." In a pattern or practice case, the plaintiff must prove widespread discrimination, usually using statistics as well as testimony regarding specific instances of discriminatory treatment.[60] The ADEA does not specifically authorize pattern and practice suits, but private plaintiffs are allowed to bring class-wide disparate treatment suits under the ADEA.[61]

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g) (2)(B) (1995).

See Brodin, *supra* note 55, at 293, for a good discussion of causation in this regard. Some commentators fear that this provision will make affirmative action plans illegal altogether, despite the language in the 1991 Act to the contrary. *See* Cathcart & Snyderman, *supra* note 8, at 876-80.

59. *See* Eglit, *supra* note 28, at 1153-58.

60. 42 U.S.C. § 2000e-6 (1995). *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). Even if the court finds a pattern and practice of discrimination, it can deny relief to individual class members against whom the defendant can prove it did not discriminate. *Id.* at 361-62; Paul E. Starkman, *Alleging a "Pattern or Practice" Under ADEA: An Analysis of the Impact and Problems of Proof*, 8 LAB. LAW. 91 (1992).

61. Arnold v. Postmaster Gen., 667 F. Supp. 6 (D.D.C. 1987), *rev'd on other grounds*, 863 F.2d 994 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 846 (1989); *see Mooney*, 54 F.3d at 1216-19; Eglit, *supra* note 30, at 172-74. Class actions cannot be maintained under Title VII pursuant to Rule 23(b)(2), but must utilize the opt-in mechanism of the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1995) (requiring parties to consent in writing to be party to an action). *See* SCHLEI & GROSSMAN, *supra* note 39, at 495-96.

The object in all of these types of cases is to determine whether the employer intentionally discriminated against the plaintiff. The question is whether the employer intentionally treated the employee differently because of her race, sex, religion, color, or national origin under Title VII, or because of her age under the ADEA.

Although courts generally apply to the ADEA the allocation of proof of disparate treatment developed under Title VII, there have been some points of difference.[62] Most importantly for the purposes of this Article, cases involving factors that correlate strongly with age – most notably seniority, salary, and tenure – have, until recently, usually been brought under the disparate treatment theory.[63] By contrast, cases involving race or sex-correlated criteria have usually been brought as disparate impact cases under Title VII.[64] The Supreme Court apparently eliminated this difference between Title VII and the ADEA in *Hazen Paper Co. v. Biggins.*[65]

A. Hazen Paper Co. v. Biggins

The plaintiff in *Hazen Paper* was discharged shortly before his pension was to vest. He alleged that his employer discharged him to keep his pension from vesting and because of his age.[66] The jury found that the employer discharged the plaintiff because of his age,

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62. *See supra* note 47.

63. *Compare* cases cited *infra* notes 112-14 *with* cases cited *infra* note 105.

64. It should be noted that it is not clear under Title VII that it is permissible to use factors that correlate strongly with race, for example. *See generally* PLAYER ET AL., *supra* note 31, at 334. The issue does not arise in the context of disparate treatment cases under Title VII, because disparate impact has been used more commonly in Title VII cases than in ADEA cases. *See generally* Mack A. Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 TOL. U. L. REV. 1261, 1266-67 (1983).

65. 507 U.S. 604 (1993). Since the court analyzed disparate treatment cases generally, *Hazen Paper* probably applies as well to Title VII. 507 U.S. at 610. The consequences of *Hazen Paper* are more serious for ADEA cases, because disparate impact has not been definitely determined to apply to the ADEA, as it does to Title VII.

66. *Id.* at 606-07.

in violation of the ADEA, and to keep his pension from vesting, in violation of ERISA.[67] The question the Court was concerned with was whether discharging the plaintiff to keep his pension from vesting was age discrimination per se. The Court determined it was not. Although pension vesting or "years of service" was correlated with age, it was not perfectly correlated with age.[68] The pension-vesting period in this case was ten years, and people under forty could also be close to vesting.[69] The Court ruled that disparate impact was not a question, because the case had been brought as a disparate treatment case. In any event, even if the employment practice had a disparate impact on older employees, the practice was still a "factor other than age."[70] The Court explained,

> In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision.
>
> Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.[71]

The employer may not use age as a proxy for ability, but when the decision is based on any factor other than age, "the problem of inaccurate and stigmatizing stereotypes disappears."[72]

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67. *Id.* at 606.

68. *Id.* at 611. The Court did not review but simply noted that the lower court had properly affirmed the jury's verdict regarding the ERISA violation. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 610 (citations omitted).

72. *Id.* at 611. This is consistent with the Court's decision in St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), which was issued shortly after *Hazen Paper*. In *Hicks*, the Supreme Court held that proving only that the employer lied about the reason for the employment decision was insufficient to show pretext. In other words, the Court is requiring more proof in disparate treatment cases, which have always been difficult to prove. *See supra* note 49 and

The Supreme Court equated a "factor other than age" with a legitimate, nondiscriminatory reason and "clarified" that defense as well.[73] A legitimate, nondiscriminatory reason[74] or a "factor other than age" can be any reason, regardless of how improper or illegal, as long as it does not violate the particular act under which the plaintiff is suing. "For example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA."[75]

In *Hazen Paper*, the Court determined that an employer does not violate the ADEA if the employment decision is based on any factor "other than age," even if the factor is correlated with age, as long as the factor does not correlate perfectly with age or is not a pretext for discrimination.[76] The Supreme Court's decision in *Hazen Paper* can be interpreted as being unnecessarily expansive, diluting the effectiveness of the Act for disparate treatment purposes.[77] Instead of merely holding that an employment decision

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accompanying text.

Because the 1991 Civil Rights Act allows jury trials in disparate treatment cases under Title VII, *see infra* note 189, assuming it is easier to convince a jury than a judge, disparate treatment cases may become easier to prove. This may be, in part, why summary judgment for the defendant is easier to win. Whatever the reason, the Supreme Court has made it easier for the defendant to have the case dismissed on summary judgment. *See infra* note 49 and accompanying text.

73. The Court stated that "[a]lthough some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect, . . . this reading is obviously incorrect." 507 U.S. at 612 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (a Title VII case)).

74. One noted commentator has opined that "reasons which are illegal, totally irrational, arbitrary or idiosyncratic will not be legitimate because they cannot or should not support an inference of proper motivation." PLAYER ET AL., *supra* note 31, at 523.

75. 507 U.S. at 612.

76. *Id.* at 609-11.

77. Indeed the lower courts are interpreting *Hazen Paper* to give carte blanche to treat evidence of the use of an age-correlated criterion as negligible evidence of age discrimination. *See infra* notes 113-14 and accompanying discussion. Few courts are requiring the employer to justify the use of an age-

based on an age-correlated factor was not age discrimination per se, the Court went farther and determined that the use of a factor that simply correlated with age was a legitimate, nondiscriminatory reason for discharge requiring the plaintiff to prove pretext. In other words, the Court would not require the employer to bear the burden of producing evidence if it had a legitimate reason for using the age-correlated factor, unless the factor correlated *perfectly* with age.[78]

The Court did not explain which age related factors would not be allowed but only reasoned that factors such as years of service are analytically distinct from age because a person under forty could have ten years of service and be close to vesting as well.[79] The harder issues are those such as gray hair, which are not exclusively limited to people over forty but are stereotypical of older people. If a criterion did not mention age, but was perfectly correlated with age, such as more than thirty years of service, surely the Supreme Court would disallow it as a factor "other than age."[80]

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correlated criterion. *Compare infra* note 116 and accompanying text *with infra* notes 113-14 and accompanying text. Robert Gregory disagreed with this reading of *Hazen Paper*, interpreting the decision to mean only that the use of an age-correlated factor is not discriminatory per se. Robert J. Gregory, *There Is Life in That Old (I Mean, More "Senior") Dog Yet: The Age-Proxy Theory After Hazen Paper Co. v. Biggins*, 11 HOFSTRA LAB. L.J. 391 (1994); *accord* Sloan, *supra* note 19.

78. *See* Gregory, *supra* note 77; Sloan, *supra* note 19.

79. *Hazen*, 507 U.S. at 611.

80. *Compare* Johnson v. New York, 49 F.3d 75 (2d Cir. 1995) (policy that correlated perfectly with age must be justified using BFOQ analysis) *with* DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 727 (3d Cir. 1995) (indicating that a "plan cannot be said to be . . . facially discriminatory [if it] required referencing a fact outside the . . . ADEA.").

In *Johnson v. New York*, the plaintiff, a civilian security guard at a National Guard base, was required to maintain membership in the National Guard as a condition of his employment. When the plaintiff was forced to retire from the Guard at age 70, pursuant to military regulations, he lost his civilian job as well. The majority required the defendant to prove BFOQ for requiring the dual status, which necessarily ended with the mandatory retirement. 49 F.2d at 80. The dissent said that this was a case in which loss of dual status was correlated with age, but not perfectly correlated because civilian employees could lose their dual status for reasons other than mandatory retirement. *Id.* at 80-83 (Jacobs, J.,

The Supreme Court almost exclusively relied upon Title VII cases to support its conclusion in *Hazen Paper*.[81] The Court never specifically referred to the defense of "reasonable factors other than age" (RFOA) nor did the Court analyze the defense except in general terms, referring to the employment decision as based on "factors other than age."[82] The effect of the Court's decision, however, apparently precludes a different interpretation of the defense of RFOA. Although it appears anomalous that the Court did not attempt a more careful analysis in this regard, the lower courts prior to *Hazen Paper* had generally not attempted to analyze the issue expressly in terms of RFOA either, merely holding that unjustified age-correlated factors were discriminatory.[83] The explanation may be, as other scholars believe,[84] that the holding of the Supreme Court's decision in *Hazen Paper* is simply that the use of an age-correlated factor is not discriminatory per se. The decision is susceptible to that interpretation. However, if the remainder of the opinion is dicta, it is strong dicta, and it has affected the decisions of the lower courts.[85] To fully understand the implications *Hazen Paper* may have for the ADEA, an examination of RFOA before and after *Hazen Paper* is necessary.

B. Reasonable Factors Other Than Age

The legislative history indicates that Congress recognized that

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dissenting).

81. *Hazen*, 507 U.S. at 608-14.

82. *Id.* at 611.

83. *See* cases cited *infra* note 105. The principal cases analyzing RFOA involved explicit use of age as a factor and should have been analyzed under the affirmative defense of bona fide occupational qualification, *see* EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984), or used a factor that correlated perfectly with age, pension eligibility. *See* EEOC v. Local 350, Plumbers & Pipefitters, 982 F.2d 1305 (9th Cir. 1993); EEOC v. Westinghouse Elec. Corp., 869 F.2d 696, 706 (3d Cir. 1989), *cert. granted and judgment vacated*, 493 U.S. 801 (1989); EEOC v. City of Altoona, 723 F.2d 4 (3d Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

84. *See* Gregory, *supra* note 77; Sloan, *supra* note 19.

85. *See infra* text accompanying notes 112-16.

some older persons were not able to perform, and that employers should be able to make decisions based on an individual employee's incapacity to perform a particular job.[86] In order to make it clear that an age-related disability that affects job performance would be a valid basis for disqualification, Congress created the defense of "reasonable factors other than age."[87] The ADEA provides, "It shall not be unlawful for an employer, employment agency, or labor organization – (1) to take any action otherwise prohibited under subsections (a), (b), (c) or (e) of this section . . . where the differentiation is based on reasonable factors other than age."[88]

Any discussion of RFOA must now center on the Supreme Court's decision in *Hazen Paper*,[89] because the Court strongly indicated that an employer does not violate the ADEA if he bases his decision on "*any* factor other than age."

1. RFOA Before Hazen Paper

Commentators have speculated that the Equal Pay Act of 1963[90] inspired the RFOA defense under the ADEA.[91] This assumption is likely correct, because the Equal Pay Act (EPA) is part of the Fair Labor Standards Act from which Congress took the remedial portion of the ADEA.[92] The EPA prohibits employers from paying a salary differential based on sex for equal work.[93] One of the defenses to the EPA is paying a salary differential based on "any other factor other than sex."[94] The ADEA added the word

86. *See* Kaminshine, *supra* note 25, at 302.

87. *See* Kaminshine, *supra* note 25, at 302.

88. 29 U.S.C. § 623(f)(1) (1988).

89. 507 U.S. 604 (1993). See *supra* notes 66-85 and accompanying text for a description of the case.

90. Pub. L. No. 88-38, 77 Stat. 56.

91. *Id.* § 3, at 57; ADEA, 29 U.S.C. § 623(f)(1) (1988); *see* Eglit, *supra* note 30, at 194-95.

92. 29 U.S.C. § 626 (1988 & Supp. V 1993).

93. Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 57; *see* Eglit, *supra* note 30, at 194.

94. *Id.*

"reasonable" to "factors other than age." Looking at the statutory language alone, assuming the EPA inspired the defense of RFOA under the ADEA, Congress must have meant to impose a higher burden by adding the term "reasonable" to the same defense under the ADEA.[95]

In fact, most courts have interpreted the EPA's "any other factor other than sex" to mean more than *any* factor other than sex.[96] For example, in *Kouba v. Allstate Insurance Co.*,[97] the employer paid its insurance agents based on past salary. Because women historically have been paid less than men, the employer's practice resulted in women being paid less than men. If the court had applied *any* factor other than sex, as the Supreme Court did in *Hazen Paper* with age, past salary would have clearly qualified as *any* factor other than sex. The court in *Kouba* recognized there are three possible interpretations:

> At one extreme are two that would tolerate all but the most blatant discrimination. Kouba [the plaintiff] asserts that Allstate [the defendant] wrongly reads "factor other than sex" to mean any factor that either does not refer on its face to an employee's gender or does not result in all women having lower salaries than all men.[98] Since an employer could easily manipulate factors having a close correlation to gender as a guise to pay female employees discriminatorily low salaries, it would contravene the Act to allow their use simply because they also are facially neutral or do not produce complete segregation. . . .
>
> At the other extreme is an interpretation that would

95. The legislative history of the RFOA defense is sparse and inconclusive. *See* Eglit, *supra* note 30, at 180-81.

96. *See* MACK A. PLAYER ET AL., EMPLOYMENT DISCRIMINATION LAW 418 (2d ed. 1995).

97. 691 F.2d 873 (9th Cir. 1982).

98. This is evidently the Supreme Court's interpretation of "factor other than age" under the ADEA. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). Presumably, if the factor correlated perfectly with age, it would not be a factor other than age. *Id.*

> deny employers the opportunity to use clearly acceptable factors. Kouba insists that in order to give the Act its full remedial force, employers cannot use any factor that perpetuates historic sex discrimination. . . . But while Congress fashioned the Equal Pay Act to help cure long-standing societal ills, it also intended to exempt factors such as training and experience that may reflect opportunities denied to women in the past.[99]

The court in *Kouba*, then, concluded that all three of the above interpretations missed the point, "because they do not focus on the reason for the employer's use of the factor."[100] The court concluded that the employer cannot use a factor "which causes a wage differential between male and female employees absent an acceptable business reason."[101]

The Supreme Court did not require an acceptable business reason in *Hazen Paper*. The Court required *any* factor other than age, regardless of the impact it had on the protected age group, as long as the factor was not perfectly correlated with age or was not shown to be a pretext for age discrimination.[102] This interpretation is inconsistent with a reasoned interpretation of the ADEA, which specifically adds that the factors other than age must be reasonable. This is especially true when comparing RFOA with its counterpart under the EPA that does not on its face require a "reasonable" factor other than sex, but the courts, nevertheless, require justification for factors that have an adverse impact on gender.

Before *Hazen Paper*, the prevailing view was that to qualify as an RFOA, the factor could not be correlated with age.[103] As Professor Mack Player reasoned, factors that are "inherently time-based, such as experience, years on the job, and tenure . . . are inherently age-related and thus cannot be considered 'factors other

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99. 691 F.2d at 876.
100. *Id.*
101. *Id.*
102. *Hazen*, 507 U.S. at 611.
103. *See* cases cited *infra* note 105; Player, *supra* note 64, at 1278.

than age.'"[104] The lower courts generally followed this position.[105]

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104. Player, *supra* note 64. Professor Player also thought that RFOA as here defined should be the defense to disparate impact cases under the ADEA. *See* discussion of disparate impact *infra* Part V.

105. *See, e.g.*, Taggart v. Time, Inc., 924 F.2d 43 (2d Cir. 1991); Abbott v. Federal Forge, Inc., 912 F.2d 867, 875-76 (6th Cir. 1990); Jardien v. Winston Network, Inc., 888 F.2d 1151, 1157-58 (7th Cir. 1989); White v. Westinghouse Elec. Co., 862 F.2d 56, 62 (3d Cir. 1988); Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987), *overruled by* Anderson v. Baxter HealthCare Corp., 13 F.3d 1120 (7th Cir. 1994); Reichman v. Bonsignore, Brignati & Mazzotta P.C., 818 F.2d 278, 280-81 (2d Cir. 1987); Dace v. ACF Indus., 722 F.2d 374, 378 (8th Cir. 1983); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691 (8th Cir. 1983); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980). *Contra* Williams v. General Motors Corp., 656 F.2d 120, 131 n.131 (5th Cir. 1981); Laugeson v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975).

The courts have not been consistent in analyzing age-correlated factors as RFOAs; rather, some courts have analyzed such factors as legitimate nondiscriminatory reasons. Other courts have simply said that age-correlated factors are discriminatory per se; still others have said that age-correlated factors cannot satisfy business necessity. Only a few courts have analyzed age-correlated factors in terms of the RFOA defense.

In Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691 (8th Cir. 1983), for example, the defendant tried to justify its reduction in work force plan, which had a disparate impact on older employees, as a cost saving measure required by business necessity. The defendant had reserved certain positions for non-tenured faculty, because they were paid less than tenured faculty. *Id.* at 691. The court said that "economic savings derived from discharging older employees cannot serve as a legitimate justification under the ADEA . . . ." *Id.* at 692. Although the plan was based on tenure status rather than age, the court recognized that

> because of the close relationship between tenure status and age, the plain intent and effect of the defendants' practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts. If the existence of such higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated.

Id. Although this was a disparate impact case, the court evidently believed that the policy was discriminatory per se, as did the court in Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), which was also a disparate impact case. In the *Geller* case the employer refused to hire teachers with more than five years of experience, a policy that impacted 92% of the teachers over 40. The court said that this policy was discriminatory per se and could not be justified by business

For example, in *Metz v. Transit Mix, Inc.*,[106] the employer discharged an employee because it wanted to save the high cost of his salary. The court decided that "[g]iven the correlation between Metz's higher salary and his years of satisfactory service, allowing Transit Mix to replace Metz based on the higher cost of employing him would defeat the intent of the statute."[107] The court indicated that it would analyze the use of pay as a proxy for age on a case-by-case basis. In response to the dissent's view that discharging one whose output or productivity was less than another was an RFOA, the court concluded that this makes "totally vulnerable the employees who are paid a little more because they have been with the company a little longer."[108] In addition, the court considered that cost may qualify as an RFOA, citing a Sixth Circuit decision ruling that the employer may be able to justify the cost rationale if based on serious economic necessity.[109]

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necessity. *Id.* at 1033-34.

In Reichman v. Bonsignore, Brignati & Mazzotta P.C., 818 F.2d 278 (2d Cir. 1987), the court was reviewing a jury verdict in favor of the plaintiff. The court ruled that evidence that the defendant would have saved $60,000 in pension costs in firing the plaintiff 10 months before her pension vested was sufficient to support the verdict. The court assumed, without analyzing the point, that desire to save pension costs would violate the ADEA. *Id.* at 280-81.

In Jardien v. Winston Network, Inc., 888 F.2d 1151 (7th Cir. 1989), the court approved the instruction to the jury in the lower court that "salary savings that can be realized by replacing a single employee aged 60, with a younger, lower-salaried employee does not constitute a permissible, non-discriminatory justification." *Id.* at 1157. In this case the defendant complained that the plaintiff was a new hire, thus, his salary did not reflect his seniority. Nevertheless, the court determined that his salary did reflect his greater experience in the workforce, which was the equivalent. *Id.* at 1157-58. Similarly, the court in Laugeson v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975), stated that if "too many years on the job" meant length of service, which is inevitably related to age, that would show discrimination. *Id.* at 313.

106. 828 F.2d 1202 (7th Cir. 1987), *overruled by* Anderson v. Baxter HealthCare Corp., 13 F.3d 1120 (7th Cir. 1991) (citing Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)).

107. *Id.* at 1207.

108. *Id.* at 1209.

109. *Id.* at 1208 (citing EEOC v. Chrysler Corp., 733 F.2d 1183, 1186 (6th

The courts that held age-correlated criteria to be discriminatory per se were incorrect. Congress clearly intended that employers' business justifications should be considered.[110] Equally clear is that age-correlated factors, without more, should not be considered "reasonable factors other than age."

2. RFOA After Hazen Paper

Although other scholars opine that *Hazen Paper* did not interpret RFOA or did not mean that employers could use "any factor other than age" as a defense,[111] the lower courts are interpreting the case very broadly.[112] After *Hazen Paper*, most

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Cir. 1984)). In *Chrysler Corp.*, the Sixth Circuit ruled that the company's imminent bankruptcy may qualify as an RFOA. The case should have been analyzed as a bona fide occupational qualification case, because there was an explicit age qualification.

A harder question is whether the desire to save costs should be an RFOA. There is some evidence that Congress did not intend to allow employers to pay older employees less because they were less marketable and that this was the very evil the ADEA was designed to forbid. *See* Kaminshine, *supra* note 25, at 279-83; *cf. Chrysler Corp.*, 733 F.2d 1183 (6th Cir. 1983) (requiring the employer to prove that burdening the class of people over fifty-five was the least detrimental alternative).

> [A] general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies.

29 C.F.R. § 860.103(h) (1979).

110. *See* Kaminshine, *supra* note 25, at 289; *infra* text accompanying note 211.

111. *See* Sloan, *supra* note 19; Gregory, *supra* note 77.

112. *See* Brodie v. General Chem. Corp., 74 F.3d 1248 (unpublished opinion), *available in* Nos. 94-8094, -8095, 1996 WL 11838 (10th Cir. 1996). In *Brodie*, the plaintiffs lost, and complained that a "pure economic benefit to the employer resulting from discriminatory discharge of older, more senior, employees should not provide a carte blanc, instructionally stated, defense to their age discrimination claim." *Id.* at *5. The court of appeals approved the instruction citing *Hazen Paper*. *See also* EEOC v. G-K-G, Inc., 39 F.3d 740 (7th Cir. 1994) (indicating that discharge to save higher cost of salary, even though

courts are granting summary judgment in favor of the defendant on the basis that even if the plaintiff proved that the employer acted based on an age-related criterion, this alone would be insufficient to create an inference of age discrimination.[113] In addition, many

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highly correlated with age is a lawful motive).

113. *See* Bialas v. Greyhound Lines, 59 F.3d 759, 763 (8th Cir. 1995); Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 15-2 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 709 (1996) (holding that, even if plaintiff had proven the defendant relied on his high salary, seniority and/or approaching eligibility for retirement benefits, this would be insufficient to support a finding of age discrimination); Bradford v. Norfolk S. Corp., 54 F.3d 1412, 1421 (8th Cir. 1995) (holding that the desire to save the cost of benefits is insufficient to establish an inference of age discrimination); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995) (holding that the mere fact that the employer offered an enhanced benefit package for waiving statutory rights that may be more valuable to employees covered by the ADEA is insufficient to constitute disparate treatment; however, the situation would have been different if the employer had conditioned enhanced benefits on waiving ADEA rights only), *cert. denied*, 116 S. Ct. 306 (1995); Allen v. Diebold, Inc., 33 F.3d 674 (6th Cir. 1994) (holding that evidence the employer closed two unionized plants where eighty percent of the employees were over forty and hired workers at two new non-union plants, eighty-three percent of whom were under forty, was insufficient to survive summary judgment). *But see* Alzona v. Mid-States Corporate Fed. Credit Union, No. 92 C 8244, 1995 WL 134767, at *4 (N.D. Ill. 1995) (denying summary judgment on the plaintiff's age discrimination claim, because the plaintiff offered evidence to show not only that she was fired shortly before her pension was to vest but also that she was replaced with a younger worker, along with other evidence of pretext.) In EEOC v. California Micro Devices Corp., 869 F. Supp. 767 (D. Ariz. 1994), the court held that an employer's firing of its sixty-two year old employee due to the employee's impending retirement was not discriminatory per se. The proffered reason could, however, be a pretext for age discrimination. Thus, a question of material fact remained and summary judgment was inappropriate.

Following are several other cases, broken down by particular age-related criterion, that have ruled that, even if the plaintiff proved that the defendant acted pursuant to an age-correlated criterion, it is insufficient to create an inference of age discrimination.

High Salary Costs: Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125-26 (7th Cir. 1994); Phillips v. Lehigh Valley Ass'n of Rehabilitation Ctrs., 1995 WL 27152 (E.D. Pa. 1995); Shore v. A.W. Hargrove Ins. Agency, 873 F. Supp. 992 (E.D. Va. 1995); Kreimeyer v. Hercules Inc., 892 F. Supp. 1369 (D. Utah 1995);

courts are treating the employer's use of age-correlated criteria as negligible evidence of age discrimination. Even when coupled with other evidence that should amount to pretext, courts are granting summary judgment in favor of defendants.[114] Some have correctly

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Blistein v. St. John's College, 860 F. Supp. 256 (D. Md. 1994), *aff'd*, 74 F.3d 1459 (4th Cir. 1996); Pagliarini v. General Instrument Corp., 855 F. Supp. 459 (D. Mass. 1994), *aff'd without opinion*, 37 F.3d 1484 (1st Cir. 1994); Motzny v. Hilander Food Stores, 1994 WL 148716 (N.D. Ill. 1994), *aff'd*, 47 F.3d 1173 (7th Cir. 1995). *But see* Rhodes v. Guiberson Oil Tools, 39 F.3d 537 (5th Cir. 1994) (holding that evidence of high salary along with other evidence of discrimination was enough to support the lower court's denial of a JNOV for the defendant), *aff'd on rehearing en banc*, 1996 WL 37846 (5th Cir. 1996); Kraemer v. Franklin & Marshall College, 909 F. Supp. 268 (E.D. Pa. 1995) (denying the defendant's motion to exclude testimony that the defendant used an age-correlated criterion, the court held that the age-correlated criterion alone would not be proof of discrimination, but the plaintiff could have an opportunity to prove that it was a pretext for age discrimination).

Experience or Overqualification: Jenkins v. Holloway Sportswear, 14 F.3d 601 (unpublished opinion), *available in* 1993 WL 503736 (6th Cir. 1993) (holding that even if plaintiff could prove that the defendant discharged him because of his experience, this alone was insufficient to establish age discrimination); Pagliarini v. General Instrument Corp., 855 F. Supp. 459, 463 (D. Mass.), *aff'd*, 37 F.3d 1484 (1st Cir. 1994).

114. *Pension Benefits*: Borza v. Hallmark Cards, 45 F.3d 425 (unpublished opinion), *available in* 1995 WL 8016 (4th Cir. 1995); Longnecker v. Transco Energy Co., 1994 WL 382619 (E.D. La. 1994); Babich v. Unisys Corp., 842 F. Supp. 1343 (D. Kan. 1994).

Healthcare Costs: Caponigro v. Navistar Int'l Transp. Corp., 1995 WL 238655 (N.D. Ill. 1995).

Seniority: Lubeck v. Comet Die & Engraving Co., 848 F. Supp. 783 (N.D. Ill. 1994).

Other: Gould v. Kemper Nat'l Ins. Co., 880 F. Supp. 527 (N.D. Ill. 1995) (holding that an appreciation of "new ideas" was not necessarily a denigration of the old and was analytically distinct from age), *motion denied*, No. 93 C 7189, 1995 U.S. Dist. LEXIS 14102 (N.D. Ill. Sept. 6, 1995), *and aff'd*, No. 95-1883, 1996 U.S. Dist. LEXIS 1402 (7th Cir. Feb. 27, 1996); Leidig v. Honeywell, 850 F. Supp. 796, 806 (D. Minn. 1994) (holding that use of "flexibility" as a criterion for lay-off, even if it correlates with age, does not constitute evidence of age discrimination); *see, e.g.*, O'Connor v. Consolidated Coin Caterers Corp., 56 F.3d 542 (4th Cir. 1995) (supervisor stated that the plaintiff was too old and the company needed new blood), *rev'd and remanded*, No. 95-364, 1996 WL 14564

held that a mere allegation that the defendant used an age-correlated criterion is insufficient to avoid summary judgment in favor of the employer.[115] Few courts have interpreted *Hazen Paper* to mean that the use of an age-related criterion, while not discriminatory per se, must be justified.[116]

(U.S. April 1, 1996) (reversal based on unrelated issue); Woroski v. Nashua Corp., 31 F.3d 105 (2d Cir. 1994) (summary judgment granted despite "some evidence of age bias" in supervisor's statements); Blistein v. St. John's College, 860 F. Supp. 256 (D. Md. 1994), *aff'd*, 74 F.3d 1459 (4th Cir. 1996) (plaintiff's discharge was based on high salary; in addition he produced evidence of a statement by management that the plaintiff would be "deadwood," contradictory explanations for the discharge and the fact that the plaintiff was the oldest person in his position, all of which was insufficient to avoid summary judgment); *supra* note 54.

At least one court has hinted that it could go even further. In EEOC v. American Airlines, 48 F.3d 164 (5th Cir. 1995), the court noted with regard to the defendant's express policy of not hiring pilots unless they could progress to the rank of Captain before the mandatory retirement age of sixty: "There is a strong argument that American's hire-only-Captains rule is not an age-based qualification at all, but an experience-mandating qualification." *Id.* at 167 n.4. In this case the requirement perfectly correlated with age, because the people who would not be hired would all be over forty.

115. *See, e.g.*, Serben v. Inter-City Mfg. Co., 36 F.3d 765 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1402 (1995) (trial judge erred in failing to grant judgment as a matter of law in favor of defendant, because, inter alia, plaintiff's status as a more experienced and higher paid employee does not permit an inference of age discrimination); Greyson v. McKenna & Cuneo, 879 F. Supp. 1065 (D. Colo. 1995) (summary judgment granted when plaintiff's only evidence of discrimination was that younger employees were retained); Bornstad v. Sun Co., 1993 WL 257310 (E.D. Pa. 1993) (plaintiff's unsupported belief that age discrimination was the basis for unfavorable employment decisions was insufficient to avoid summary judgment).

116. *See* EEOC v. Insurance Co., 49 F.3d 1418 (9th Cir. 1995). In this case, the insurance company had rejected the plaintiff as a loss control representative, because he was overqualified. *Id.* at 1419. The court said that, although being "overqualified" was not necessarily a violation of the ADEA, because overqualification could serve as a proxy for age discrimination, the defendant must provide some objective explanation for the term. *Id.* at 1420-21. The employer explained that it feared that the plaintiff's experience in loss control would cause him to delve too deeply into the accounts and waste time. The court concluded that that explanation was sufficient. *Id.* at 1421.

The Court in *Hazen Paper* has damaged the ADEA statutory scheme. The overwhelming majority of courts have recognized that in a case in which the employee is alleging age discrimination and the employer interposes a non-age-related criterion, such as poor performance, the *Burdine-McDonnell Douglas* model of proof applies.[117] In other words, the employee bears the burden of persuasion throughout. The employer need only articulate a legitimate, nondiscriminatory reason, and the employee must prove pretext.[118] If the employer uses a particular age as a criterion and excludes members of the protected group, the employer bears the burden of persuasion to prove a bona fide occupational qualification (BFOQ). A BFOQ is an affirmative defense and requires the employer to show that an employment criterion that is based on the age of the protected group is essential to the operation of the business.[119]

Hazen Paper appears to have opened a large gap between the

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117. *See* SCHLEI & GROSSMAN, *supra* note 39 at 497. In Thomure v. Phillips Furniture Co., 30 F.3d 1020 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1255 (1995), the court reversed the jury verdict in favor of the plaintiff and affirmed the magistrate's prior grant of summary judgment in favor of the defendant. The court stated,

> Phillips [the defendant] based its decision not on age but on level of compensation. The warehouse employees with the highest salaries [among whom were the plaintiffs] were, quite naturally, those with the most seniority. With service approaching thirty-five years, those employees were not only in the protected age group (older than forty) but were also among the oldest employees in the Phillips warehouse. . . . Yet an employee's age is analytically distinct from his years of service.

Id. at 1024 (quoting *Hazen Paper*, 507 U.S. 604, 611 (1993)). The court did state that the defendant had a legitimate business justification because of its economic difficulties and that younger employees had lost their jobs altogether, while the plaintiffs had only had their salaries reduced. *Id.*; *see* text accompanying *supra* notes 46-52 and *infra* note 280.

118. *See* SCHLEI & GROSSMAN, *supra* note 39 at 497-502.

119. 29 U.S.C. § 623 (f)(1) (1990); *see* Western Airlines v. Criswell, 472 U.S. 400 (1985).

proof required for BFOQ[120] and the proof required for RFOA.[121] Where in this scheme should RFOA come in? If the criterion is based on age or is perfectly correlated with age, BFOQ would apply.[122] If the employment criterion is only strongly correlated with age, the employer has no burden to justify it and can even use it as a defense under *Hazen Paper*'s interpretation of RFOA or as a legitimate, nondiscriminatory reason.[123] Logically, RFOA should apply when the employer's reason correlates with age. At this point, the employer should have to prove a business reason for using an age-correlated criterion. If, as the Supreme Court has indicated in *Hazen Paper*, the RFOA defense has been stripped of any meaning independent of legitimate, nondiscriminatory reason, the employee bears the burden of persuasion to prove that the employer used the age-correlated criterion to discriminate based on age. In other words, the employee must prove that the employer's reliance on an age-correlated criterion was a pretext for age discrimination.

Despite the contention of some scholars that the Court did not interpret RFOA in *Hazen Paper*,[124] there appears to be no place for the defense otherwise. If the courts do not require the employer to defend its use of an age-correlated criterion as an RFOA, as in *Hazen Paper*, in what situation does the RFOA become a defense?

Even if the Supreme Court ultimately recognizes disparate impact under the ADEA, the ADEA will retain the aforementioned gaps.[125] If the Court determines that disparate impact does not apply, the ADEA will be more substantially damaged. At the present time, employers may be deterred from using age-correlated

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120. *See Western Airlines*, 472 U.S. at 418-23.

121. *Hazen Paper*, 507 U.S. at 611.

122. *Compare* Johnson v. New York, 49 F.3d 75 (2d Cir. 1995) (holding that a policy that correlated with age must be justified using the BFOQ analysis) *with* DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 727 (3d Cir. 1995) (indicating that a "plan cannot be said to be . . . facially discriminatory [if it] required referencing a fact outside the . . . ADEA").

123. *Hazen Paper*, 507 U.S. at 610-11.

124. *See* Sloan, *supra* note 19; Gregory, *supra* note 77.

125. *See infra* text accompanying notes 287-97.

criteria as the basis for unfavorable decisions, because the criteria have a disparate impact, which the employer must justify by the defense of business necessity, on the protected age group.

The Court in *Hazen Paper* made it clear that it was dealing with disparate treatment, not disparate impact,[126] but gratuitously remarked that it had never decided whether disparate impact applied in an ADEA case.[127] Although the courts have made it clear that the allocation of proof in a Title VII disparate treatment case applies as well to a case of disparate treatment under the ADEA,[128] the issue of whether the disparate impact model applies to the ADEA is not as clear.[129] Because the Supreme Court has cast no doubt upon the subject, most courts have assumed that disparate impact does apply to the ADEA.[130] If the Supreme Court ultimately decides not to apply the disparate impact model to the ADEA, *Hazen Paper* will allow all but the most blatant age discrimination. Even if the disparate impact model does apply to the ADEA, as discussed in the next section, *Hazen Paper* may still have a disastrous effect on the model, because RFOA rather than a

126. 507 U.S. at 610.

127. *Id.* (citing Markham v. Geller, 451 U.S. 945 (1981) (Rehnquist, J., dissenting from denial of certiorari)).

128. *See* SCHLEI & GROSSMAN, *supra* note 39, at 497-98. Some courts require that the plaintiff show some connection between the employment action and the plaintiff's age, such as showing that the employer replaced the plaintiff with someone outside the protected age group or at least someone younger. *Id.* at 498.

129. *Hazen Paper*, 507 U.S. at 618 (Kennedy, Rehnquist, & Thomas, JJ., concurring). *See supra* note 15 and discussion *infra* part V.C.

130. Some courts have held that the theory applied to the ADEA. *See, e.g.*, Maresco v. Evans Chemetics, 964 F.2d 106 (2d Cir. 1992); Shutt v. Sandoz Crop Protection Corp., 934 F.2d 186 (9th Cir. 1991); MacPherson v. University of Montevallo, 922 F.2d 766 (11th Cir. 1991); Abbott v. Federal Forge, Inc., 912 F.2d 867 (6th Cir. 1990); Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983). Other circuits have merely assumed without deciding that the theory applied to the ADEA. *See, e.g.*, Faulkner v. Super Valu Stores, 3 F.3d 1419, 1428 (10th Cir. 1993); Fisher v. Transco Servs.-Milwaukee, Inc., 979 F.2d 1239, 1245 n.3 (7th Cir. 1992); Arnold v. United States Postal Serv., 863 F.2d 994 (D.C. Cir. 1988); Akins v. South Cent. Bell Tel. Co., 744 F.2d 1133 (5th Cir.1984); Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1983).

business necessity may be the defense to a disparate impact case under the ADEA.[131]

Hazen Paper appears to have foreclosed the argument that the employer should be required to justify age-correlated criterion for disparate treatment purposes, and the lower courts have generally so held.[132] For disparate impact claims, *any* factor other than age, however, should not be a defense.

If RFOA were also a defense to disparate impact, *Hazen Paper's* tacit interpretatin of RFOA would eliminate the disparate impact theory for ADEA purposes.[133] An examination of the disparate impact theory generally and its applicability to the ADEA is appropriate at this point.

V. DISPARATE IMPACT

A. Generally

1. Before the Civil Rights Act of 1991

The Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*,[134] which substantially weakened the disparate impact model of discrimination, was the principal driving force for enactment of the Civil Rights Act of 1991.[135] Because the amendments to Title VII in this regard did not include the ADEA specifically, the law that applied to Title VII before the 1991 Act, in all probability, applies to the ADEA.[136] It is important at this point to look at the disparate impact model before Congress passed the 1991 Act, including the changes that *Wards Cove* made in the existing law.

The usual method of proof of disparate impact is statistical. The

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131. *See* discussion *infra* part V.D.

132. *See supra* text accompanying notes 112-14.

133. *See infra* text part V.D.

134. 490 U.S. 642 (1989) (superseded in part by statute).

135. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

136. This is assuming that the disparate impact theory actually applies to the ADEA, which will be discussed later. *See infra* part V.C.

plaintiff must present a prima facie case using statistics to show that an employment criterion screens out, for example, significantly more blacks than whites.[137] "The evidence in these 'disparate impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities."[138]

The plaintiff's statistics must meet certain standards in order to establish a prima facie case. First, the disparity has to be statistically significant.[139] The Supreme Court has never approved a specific test but has adverted to two tests commonly used by the lower courts, the four-fifths or eighty percent rule[140] and a rule using standard deviations.[141]

The Equal Employment Opportunity Commission set forth the four-fifths or eighty percent rule in guidelines on selection criteria, which said that in order to be statistically significant, the selection rate of the plaintiff's group must be less than four-fifths the selection rate of the group with the highest selection rate.[142] The Supreme Court in *Hazelwood School District v. United States* set forth the standard deviation rule, which considers a statistical disparity greater than two or three standard deviations statistically significant.[143] The Court has also made it clear that in order to

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137. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

138. *Id.* at 987.

139. *See* SCHLEI & GROSSMAN, *supra* note 39, at 98-99; *see, e.g.*, Finch v. Hercules Inc., 865 F. Supp. 1104 (D. Del. 1994) (holding that a difference of between 2.16 and 2.68 standard deviations is sufficiently significant to support a prima facie case).

140. Connecticut v. Teal, 457 U.S. 440, 444 n.4 (1982).

141. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 309 n.14 (1977).

142. EEOC Selection Guideines, 29 C.F.R. § 1607.4(D) (1994).

143. 433 U.S. 299, 309 n.14 (1977) (citing Castaneda v. Partida, 430 U.S. 482 (1977)). This case was a pattern and practice suit rather than disparate impact. Although it has never been clear whether the disparity has to be greater in order to prove pattern and practice, this measure has been used in disparate impact cases. *See* Peightal v. Metropolitan Dade County, Metro. Fire Dep't, 26 F.3d 1545, 1556 (11th Cir. 1994); Waisome v. Port Auth., 948 F.2d 1370, 1376 (2d Cir. 1991); Cooper v. University of Texas, 482 F. Supp. 187, 196 (N.D. Tex. 1979), *aff'd*, 648 F.2d 1039 (5th Cir. 1981).

satisfy the prima facie case, the plaintiff must compare the selection rate of her class to the proper group in terms of qualifications and labor market.[144] In addition, In *Wards Cove Packing Co. v. Atonio*,[145] the Supreme Court added that in proving a prima facie case, the plaintiff could not rely on the disparate impact of the total selection process but would have to identify the criterion that was causing the disparate impact.[146]

At this point, the burden of proof shifts to the employer to justify the practice by proving that business necessity was cause for the criterion.[147] Prior to the Civil Rights Act of 1991, proof of business necessity usually required at least that the employer prove that the employment criterion was job-related, that is, that the criterion predicted success in the job.[148] The EEOC Selection Guidelines provided that the employer must validate employment criteria by one of three statistical methods.[149]

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144. *Hazelwood*, 433 U.S. at 308.

145. 490 U.S. 642 (1989) (superseded in part by statute).

146. This was a broader reading of the law in jurisdictions that did not allow the plaintiff to attack a total selection process at all, but a more restrictive interpretation in those jurisdictions that allowed such an attack without selecting the criterion that caused the disparity. *See* Eglit, *supra* note 28, at 1132-33.

147. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). *See generally* Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1983).

148. *See* SCHLEI & GROSSMAN, *supra* note 39, at 112-14.

149. EEOC Selection Guidelines, 29 C.F.R. § 1607.5(A) (1994).

> Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. . . . Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. . . . Evidence of validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates

The Supreme Court has not provided a well-defined meaning of business necessity.[150] In *Griggs v. Duke Power Co.*,[151] in which the Supreme Court first articulated the disparate impact theory, the Court ruled the employer had to prove "business necessity,"[152] and that the employer had to show a "manifest relationship to the employment in question."[153] In *Albemarle Paper Co. v. Moody*,[154] the Court discussed the EEOC's Selection Guidelines:

> The message of these Guidelines is the same as that of the Griggs case – that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant

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have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated.

Id. § 1607.5(B).

150. *See* PLAYER ET AL., *supra* note 31, § 5.41(c).

151. 401 U.S. at 424.

152. *Id.* at 431.

153. *Id.* at 432; *see also* Philip S. Runkel, Note, *The Civil Rights Act of 1991: A Continuation of the Wards Cove Standard of Business Necessity?* 35 WM. & MARY L. REV. 1177 (1994) in which the author identified "five different formulations of the required nexus between the business practice and job performance" found in *Griggs*:

(1) "standard is shown to be significantly related to successful job performance;"

(2) "neither . . . requirement . . . is shown to bear a demonstrable relationship to successful performance of the jobs for which it is used;"

(3) "[w]hat Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance;"

(4) "if an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited;" and

(5) "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

Id. at 1182-83 (quoting *Griggs*, 401 U.S. at 426, 431-32, 436) (emphasis omitted)).

154. 422 U.S. 405 (1975).

> to the job or jobs for which candidates are being evaluated."[155]

In a later case, *New York City Transit Authority v. Beazer*,[156] the Supreme Court allowed the city to refuse to employ methadone users in transit jobs, because the goals of safety and efficiency were "significantly served" and that the rule bore a "'manifest relationship to the employment in question.'"[157] Unlike the *Albemarle* case, the Court did not require much in the way of proof that business necessity required the rule.[158] Thus, the Court at this point had sent mixed signals regarding the meaning of business necessity.

Wards Cove Packing Co. v. Atonio[159] is the Supreme Court's latest pronouncement regarding the employer's burden of proof. The Court indicated in *Wards Cove* that the employer's burden of proof was not as onerous as most courts had previously construed it to be.

> [A]t the justification stage . . . the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. . . . A mere insubstantial justification . . . will not suffice . . . . [T]here is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster . . . .[160]

Even before *Wards Cove*, the lower courts had been unable to agree on a definition of business necessity, beyond the fact that the criterion must be job-related. Some courts held the employer to a strict standard of proving that the criterion was job-related and

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155. *Id.* at 431 (quoting 29 C.F.R. § 1607.4 (1994)).
156. 440 U.S. 568 (1979).
157. *Id.* at 587 n.31 (quoting *Griggs*, 401 U.S. at 432).
158. *Id.* at 587.
159. 490 U.S. 642 (1989).
160. *Id.* at 659 (citations omitted).

essential to the business.[161] Others used "less demanding standards."[162] Some courts required only the manifest relationship between the employer's criterion and success in the job, as articulated in *Beazer*.[163] Most courts, however, interpreted *Beazer* to apply only to safety situations.[164] Some consensus had developed that proof of business necessity required proof that the employer's criterion predicted success in important aspects of the job.[165]

Before the Supreme Court decided *Wards Cove*,[166] most lower courts required the employer to bear the burden of proof and persuasion once the plaintiff proved a prima facie case.[167] The Supreme Court announced in *Wards Cove* that the burden of persuasion should remain at all times on the plaintiff.[168] At this point if the employer can meet its burden of proving business necessity, the employee has one last chance to prevail if he can suggest an alternative selection criterion that has a less disparate impact.[169] As a final blow to the disparate impact theory, the Supreme Court ruled in *Wards Cove* that the plaintiff would only

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161. Eglit, *supra* note 28, at 1131-32. The Supreme Court reinforced this standard in a footnote in Dothard v. Rawlinson, 433 U.S. 321, 331 n.14 (1977).

162. Eglit, *supra* note 28, at 1132 & n.141.

163. New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979).

164. Eglit, *supra* note 28, at 1131 & n.136.

165. *See, e.g.*, Foster v. Board of Sch. Comm'rs, 872 F.2d 1563, 1569 (11th Cir. 1989); Eldredge v. Carpenters 46 N. California Counties Joint Apprenticeship & Training Comm., 833 F.2d 1334, 1338 (9th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988); Finch v. Hercules Inc., 865 F. Supp. 1104, 1130-31 (D. Del. 1994) (holding in an ADEA case that defendant must produce evidence of a business justification, which consists of a showing "both of its legitimate employment goal and evidence of how the challenged practice significantly serves that goal"); United States v. City of Milwaukee, 481 F. Supp. 1162, 1164 (E.D. Wis. 1979).

166. 490 U.S. 642 (1989).

167. Eglit, *supra* note 28, at 1129-30.

168. In fact it is clear that the lower courts had not misinterpreted the allocation of proof, rather the Supreme Court was overruling prior caselaw in this regard, although it would not say so. *Eglit*, *supra* note 28, at 1129 n.124, 1190.

169. *See* PLAYER ET AL., *supra* note 31, § 5.41(d)(5).

win at this stage if the employer refused the suggested alternative.[170]

In sum, *Wards Cove* made a disparate impact case more difficult to prove principally by (1) requiring the plaintiff to identify the criterion causing the disparate impact,[171] (2) requiring the employer simply to articulate its defense rather than to bear the burden of persuasion,[172] and (3) requiring the employer to show only that the criterion having the disparate impact significantly serves the employer's employment and need not be essential to the business.[173]

2. *After the Civil Rights Act of 1991*

Wards Cove served as a primary reason for passage of the 1991 Civil Rights Act. The Statement of Congressional Findings in the Act states that "the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio* has weakened the scope and effectiveness of Federal civil rights protections."[174] Congress then codified the

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170. *Wards Cove*, 490 U.S. at 661.

171. *Id.* at 657-58.

172. *Id.* at 659 ("[T]he Court stated that "the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff.").

173. *See supra* text accompanying note 160. *Wards Cove* also added more to the requirement of alternative business practice:

> Of course, any alternative practices which respondents offer up in this respect must be equally effective as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals. Moreover, "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals."

Id. at 661 (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988) (O'Connor, J.). In addition, in order for the plaintiff to prevail at this point, the defendant must "refuse to adopt these alternatives." *Id.* at 660-61.

174. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (emphasis added). The Act states in part:

> § 2. Findings
>
> The Congress finds that –
>
> (1) additional remedies under Federal Law are needed to deter unlawful harassment and intentional discrimination in the workplace;

disparate impact test and clarified the burden of proof. Once the plaintiff has shown disparate impact, the employer must bear the burden of proof and persuasion in showing that the practice is "job related for the position in question and consistent with business necessity."[175] It is not at all clear what Congress intended by adding

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(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Id. (citation omitted).

175. 42 U.S.C. § 2000e-2(k) (Supp. V 1993) states in part:

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

this definition. The consternation is further exacerbated by Congress' inclusion of a memorandum in the legislation, which indicated that Congress' sole intent regarding business necessity was to return to the law before *Wards Cove*, and that other legislative history had no effect.[176] Thus, because the law was not at all clear before *Wards Cove*, the memorandum is not very helpful.[177]

Congress also added the requirement, derived from *Wards Cove*, that the plaintiff must identify the particular employment practice. Furthermore, if the case proceeds to the third stage in which the plaintiff must show an alternative business practice, the plaintiff may only prevail if the employer refuses to adopt the alternative practice.[178]

B. Effect of the 1991 Act on Disparate Impact and the ADEA

With regard to Title VII, the 1991 Civil Rights Act made substantial changes in the law as it stood on the date of the *Wards Cove* decision. The implications of the changes for the ADEA are not so clear. Professor Howard Eglit discusses the possibilities at length in an excellent article, in which he notes that scant legislative history guides the resolution.[179] Because the task of this Article is not to cover the same ground as Professor Eglit, a brief summary of his conclusions will suffice for the purposes of this Article. One

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42 U.S.C. § 2000(e)(m) (Supp. V. 1993) states that "[t]he term 'demonstrate' means meets the burden of production and persuasion."

176. 42 U.S.C. § 1981, note, *Legislative History for 1991 Amendment* (Supp. V. 1993). "No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act . . . that relates to Wards Cove – Business necessity/ cumulation/ alternative business practice." *Id.*

177. The memorandum states that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co. . . . and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio." INTERPRETIVE MEMORANDUM, 102d Cong., 1st Sess. 81 (1991), *reprinted in* 1991 U.S.C.C.A.N. 767.

178. *See supra* note 175.

179. *See* Eglit, *supra* note 28, at 1127.

possibility considered by Professor Eglit is that Congress did not think it was necessary to amend the ADEA, because the cases Congress intended to overrule were Title VII cases. This is not very likely, Eglit concluded, because the ADEA clearly follows Title VII jurisprudence.[180] The fact that Congress amended the ADEA in other parts of the Act also weighs against this conclusion.[181]

If Congress did not overlook the ADEA, the question arises of why Congress chose to leave the ADEA at the mercy of *Wards Cove*, particularly in light of the statement that the case had weakened the protections of federal civil rights laws.[182] Whatever the reason, Professor Eglit concluded that, unless the Supreme Court abandons *Wards Cove* or Congress amends the ADEA, *Wards Cove* applies.[183]

Other than the possibility that Congress merely overlooked the ADEA, which Professor Eglit discounts, there is at least one other explanation. At the time Congress passed the 1991 Act, the courts did not agree on how, and indeed whether, the disparate impact theory applied to the ADEA.[184] Some lower courts, commentators, and members of the Supreme Court had already expressed

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180. Eglit, *supra* note 28, at 1174-75.

181. *See* Eglit, *supra* note 28, at 1106-25.

182. Civil Rights Act of 1991, Pub. L. No. 102-166, 103 Stat. 1071.

183. Eglit, *supra* note 28, at 1215. Congress expressed such serious disapproval of *Wards Cove*, that courts should now consider the case too seriously undermined to continue to rely on it. Indeed, some courts have treated the applicability of the 1991 Act to the ADEA in this regard as an open question. *See, e.g.*, Fisher v. Transco Servs.-Milwaukee, 979 F.2d 1239, 1245 n.4 (7th Cir. 1992); Leidig v. Honeywell, 850 F. Supp. 796, 802 n.5 (D. Minn. 1994). Others have expressed doubt, but they did not have to decide the issue and left it open. *See, e.g.*, Faulkner v. Super Valu Stores, 3 F.3d 1419, 1429 n.8 (10th Cir. 1993); Stutts v. Sears, Roebuck & Co., 855 F. Supp. 1574, 1579 (N.D. Ala. 1994). At least one district court has said that the 1991 Act does not apply to the ADEA, because disparate impact does not comport with the ADEA. Martincic v. Urban Redevelopment Auth., 844 F. Supp. 1073, 1077 (W.D. Pa. 1994). The court appeared to object to the foundation of the disparate impact theory, that the employer could be guilty of discriminating without intending to discriminate. *Id.*

184. *See* discussion *supra* part V.C.

reservations about the application of the disparate impact theory to the ADEA,[185] so amending the ADEA may not have been an issue worth adding to the battle for passage of the 1991 Act.[186] Furthermore, it may be argued that the defense to a disparate impact claim under the ADEA is not a business necessity but a "reasonable factor other than age."[187] Additionally, amending the ADEA in other respects, such as mixed motive,[188] would have necessitated defending the omission of the ADEA from the disparate impact provisions of the 1991 Act.[189]

For whatever reason, Congress did not include the ADEA specifically in the substantive amendments to Title VII, and the argument that the ADEA can take advantage of the 1991 Act's amendments regarding disparate impact is not compelling. The ADEA, then, has as its model of proof the much-weakened version of the disparate impact model articulated in *Wards Cove.*

Applying the disparate impact theory to the ADEA produces other problems. In *Hazen Paper Co. v. Biggins*,[190] discussed above, the Supreme Court raised a red flag by stating that it has never decided whether disparate impact applies at all in ADEA cases.[191] Additionally, in a concurrence, several members of the Court referred to "substantial arguments" as to why disparate impact

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185. *See infra* notes 222-24.

186. This is especially likely because the law had been vetoed in the previous year and Congress had failed to override the veto. The Act passed only after much compromising. *See* Lilling, *supra* note 41, at 219-20. In addition, the 1991 Civil Rights Act limits jury trials to disparate treatment claims, while jury trials are available for all ADEA claims. Thus, if the ADEA had been expressly included in the 1991 Act's codification of the disparate impact model, jury trials would have been available in disparate impact cases under the ADEA, but not under Title VII. *See infra* note 189.

187. Player, *supra* note 64, at 1278-83.

188. *See supra* note 43 and accompanying text.

189. In addition, because the remedies are more generous under the ADEA and jury trials have always been available, 29 U.S.C. § 626(b)-(c) (1988), no strong reason exists to add the ADEA to the compensatory and punitive damages provisions of the 1991 Act. *See* 42 U.S.C. § 1981a(b) (Supp. V 1993).

190. 507 U.S. 604 (1993); *see supra* notes 66-89 and accompanying text.

191. 507 U.S. at 610.

should not apply in ADEA cases, citing an earlier dissent to a denial of certiorari in which Justice Rehnquist expressed that same opinion.[192] The question arises, then, whether disparate impact applies to the ADEA. Because *Hazen Paper* may have signaled a change in whether the disparate impact theory applies to the ADEA and, if so, how, the inquiry at this point proceeds into the law before and after *Hazen Paper.*

C. The Applicability of the Disparate Impact Model to the ADEA

1. Legislative History

a. Generally

Congress took word-for-word from Title VII the statutory language of the ADEA that prohibits discrimination.[193] The question, then, is: Did Congress intend that the disparate impact theory that applies to Title VII be incorporated into the ADEA? Professor Steven Kaminshine[194] and Professor Alfred Blumrosen[195] have written excellent articles on the legislative intent regarding disparate impact and the ADEA, coming to opposite conclusions. Professor Kaminshine surveyed the legislative history and found no substantial support for the proposition that Congress intended to foreclose disparate impact as a theory of liability for the ADEA.[196] Professor Kaminshine determined that Congress had been anxious that employers consider older people based upon their abilities and not upon stereotyped views of the effects of the aging process. Therefore, Professor Kaminshine argued that the legislative history is consistent with the view that Congress did not intend to allow employers to use age-correlated criterion that did not relate to

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192. *Id.* at 618 (Kennedy, J., concurring) (citing Markham v. Geller, 451 U.S. 945 (1981) (Rehnquist, J., dissenting); *see supra* text accompanying notes 22-26.

193. *See supra* note 27 (comparing the texts of the two acts).

194. Kaminshine, *supra* note 25.

195. BLUMROSEN, *supra* note 25.

196. *See* Kaminshine, *supra* note 25, at 287-95.

ability.[197]

Professor Blumrosen exhaustively surveyed the legislative history and found that Congress had identified two types of discrimination against older people: the setting of arbitrary age limits, and other practices that disadvantaged older people.[198] His conclusion was that in enacting the ADEA, Congress had intended to prohibit the setting of arbitrary age limits, which would require intentional discrimination. With regard to the other practices that disadvantaged older people, Professor Kaminshine concluded that Congress intended to deal with those factors in other ways.[199] Professor Kaminshine's response is that this analysis does not explain why Congress did not add anything about prohibiting only arbitrary age limits, but rather copied the broad Title VII proscriptions.[200]

Apart from Professor Kaminshine's conclusion, at the time the ADEA was enacted, employment discrimination law was in its infancy. It is difficult to discern a congressional intent with regard to a theory that had not been articulated at that time.[201] Therefore,

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197. *See* Kaminshine, *supra* note 25, at 288-89.

198. BLUMROSEN, *supra* note 25, at 85.

199. BLUMROSEN, *supra* note 25, at 85.

200. Kaminshine, *supra* note 25, at 299. See Eglit, *supra* note 30, at 221-23, for the view that Congress meant to include practices that commonly have a disparate impact on older people as "arbitrary" age discrimination. Professor Eglit acknowledges that Congress did find age discrimination to be different from race discrimination. However, the "fact that an employer does not overtly rely upon age as a basis for decisionmaking does not necessarily diminish the opportunity for inflicting harm. . . . Age distinctions are particularly unique because they so often are used thoughtlessly rather than as intentional expressions of invidious malice or even mildly bigoted intent." *Id.* at 222.

201. The first articulations of the objective theory of discrimination appeared in law review articles after 1967. *See* BLUMROSEN, *supra* note 25, at 71 (citing George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); ALFRED W. BLUMROSEN, THE DUTY OF FAIR RECRUITMENT UNDER THE CIVIL RIGHTS ACT OF 1964 (1968); Alfred W. Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969)); Griggs v. Duke Power Co., 401 U.S. 424 (1971), in which the Supreme Court articulated the disparate impact theory, was

to ask whether Congress intended to include disparate impact as a theory for the ADEA is to ask the same question as whether Congress intended to include the disparate impact theory for Title VII.[202] Professor Blumrosen has the best answer to the Title VII question. Much of this answer would apply as well to the ADEA question, although Professor Blumrosen himself would not agree:[203]

> The statute [Title VII] can be read either as requiring "intent" or as prohibiting practices with "adverse effect." The standard definition of discrimination in the legislative debate, a "distinction in treatment given to different individuals because of their different race" did not address the question of whether the difference had to be intended. The "impact" concept was consistent with the Congressional purpose to "lift the Negro from the status of inequality to one of equality of treatment."
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> . . . To implement the Act, [Congress] created an agency which had to interpret the statute in order to engage in investigation and conciliation. It is conventional law that the interpretations of the agency are to be given deference

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not decided until 1971. Professor Gold contended that "adverse impact, like Pallas Athena from Zeus, sprang full grown from the mind of the Supreme Court," while Professor Blumrosen, as well as Schlei and Grossman, contended that several cases foreshadowed the Court's adoption of the theory. Michael E. Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 479 n.170 (1985) (citing SCHLEI & GROSSMAN, *supra* note 39, at 5 n.12 (2d ed. 1983); Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 71 n.46 (1972)).

202. *Compare* Gold, *supra* note 201, *with* Alfred W. Blumrosen, *Griggs Was Correctly Decided - A Response to Gold*, 8 INDUS. REL. L.J. 443 (1986), *and* Katherine J. Thomson, *The Disparate Impact Theory: Congressional Intent in 1972 - A Response to Gold*, 8 INDUS. REL. L.J. 105 (1986).

203. Professor Blumrosen would probably not agree that the answer is the same, because he does not believe that disparate impact applies to the ADEA and that racial discrimination was viewed differently by Congress than age discrimination. BLUMROSEN, *supra* note 25, at 79, 85-86.

> by the courts if they are "permissible," or reasonable interpretations of the statute. In *Griggs*, the government argued for a "disparate impact" interpretation, and for a "job relatedness" requirement with respect to testing. The Court accepted the government's argument, fully aware that the agencies had consciously adopted a "broad" interpretation of the statute. Thus, it appears that *Griggs* was correctly decided under the 1964 Act.[204]

The strongest argument for applying the disparate impact theory is the fact that Congress took section 4(a)(2) of the ADEA directly from the section of Title VII, section 703(a)(2),[205] that prohibits practices having a disparate impact.[206] It is illogical to say that the same provision means something different under the ADEA than it means under Title VII, absent clear legislative intent to the contrary.[207] This is especially true here because the legislative history is inconclusive in this regard.[208] However, the most

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204. Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 14-15 (1987) (citations omitted).

The EEOC regulations provide in part:

> When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity.

ADEA, 29 C.F.R. § 1625.7(d) (1995).

205. 42 U.S.C. § 2000e-2(a)(2) (1988).

206. Connecticut v. Teal, 457 U.S. 440, 446-47 (1982); Nashville Gas Co. v. Satty, 434 U.S. 136, 141 (1977); Dothard v. Rawlinson, 433 U.S. 321, 337-38 (1977) (Rehnquist, J., concurring); General Elec. Co. v. Gilbert, 429 U.S. 125, 137 (1976); *see infra* text accompanying note 242.

207. Professor Blumrosen used the fact that intentional discrimination was the only kind of discrimination clearly identified at the time the ADEA was enacted as a point in favor of his view that the ADEA only prohibits intentional discrimination. *See* BLUMROSEN, *supra* note 25, at 97.

208. *See supra* notes 193-200 and accompanying text. The final rationale cited in Justice Rehnquist's dissent from denial of certiorari in Markham v. Geller, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), and in the Stanford casenote cited in the *Hazen Paper* concurrence, is the assertion, discussed above,

compelling argument that disparate impact does not apply is that the inclusion of the RFOA defense in the ADEA precludes the use of a disparate impact claim.[209]

b. Does RFOA Preclude Disparate Impact?

As discussed above, the legislative history does not compel any conclusion regarding the applicability of the disparate impact model to the ADEA.[210] The most likely conclusion, however, is that Congress added the defense of RFOA to allow the employer to use factors that had a disparate impact but which were nevertheless justifiable.

In his article on the legislative history of the ADEA, Professor Kaminshine's general conclusion is that Congress was concerned with employees *and* employers. Allowing the employer to make termination decisions based on reasonable factors other than age, indicates congressional concern that employers should not be forced to retain employees who cannot perform. On the other hand, Congress was also concerned about the factors that cause older employees to lose their jobs and make it difficult for them to find re-employment.[211] Therefore, a balance should be struck by requiring the employer to justify factors that have a disparate impact on older employees. Employers should ideally be required to justify the use of age-correlated factors as the affirmative defense of RFOA. If *Hazen Paper* has indeed reduced the RFOA defense to *any* factor other than age, the employer should make the justification as part of the defense to a disparate impact case by showing that criteria that have a disparate impact significantly serve the employer's employment goals. This is the defense to disparate impact that apparently applies to the ADEA, as articulated by

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that the RFOA defense precludes the disparate impact theory in ADEA cases. Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 844-48 (1982).

209. *See* Kaminshine, *supra* note 25, at 301-06; Eglit, *supra* note 30, at 217.

210. *See supra* text accompanying notes 193-200.

211. *See* Kaminshine, *supra* note 25, at 288-98.

Wards Cove Packing Co. v. Atonio.[212]

To assume that Congress could have foreseen the development of the disparate impact theory and that it in turn intended to foreclose the theory for the ADEA by inserting the defense of RFOA, is to attribute greater powers of prophecy to Congress than it likely possessed. If Congress did intend to preclude disparate impact cases under the ADEA, it would have made a clear statement to that effect, instead of adopting into the ADEA the provision, taken from Title VII, from which the disparate impact theory was derived. Likewise, Congress would probably not have used the term "reasonable," but rather would have used the "*any* factor other than age" terminology. Such wording would have been consistent with the RFOA defense's probable source, the defense of "any other factor other than sex" from the Equal Pay Act.[213] As discussed earlier, Congress must have meant something more than the notion that *any* factor other than age could be a defense.[214]

A simple, common sense view, rather than a dissection of the legislative history, indicates that Congress did not intend to allow employers to use unjustified criteria that strongly correlate with age to discharge older employees. The lower courts were generally in accord on this point until the decision in *Hazen Paper.*[215] In addition, most courts applied the disparate impact theory to the ADEA before *Hazen Paper.*[216]

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212. 490 U.S. 642 (1989) (superseded in part by statute).

213. *See supra* text accompanying notes 90-101.

214. *See supra* text accompanying notes 90-101.

Most courts require "other factors other than sex" to be related to employer concerns, *see* PLAYER ET AL., *supra* note 31, at 419, which is not that different from the *Wards Cove* definition of business necessity. *See supra* text accompanying note 160. Therefore, the "factor other than sex" defense would not preclude disparate impact compensation claims under Title VII in any event. *See* PLAYER ET AL., *supra* note 31, at 419.

215. *See* cases cited *supra* note 105.

216. *See* cases cited *supra* note 130.

2. Judicial Decisions

Before the 1991 Act, the courts interpreted Title VII and the ADEA *in pari materia*.[217] The courts generally have applied the legal principles developed under Title VII, such as the allocation of proof in a disparate treatment case articulated in *McDonnell Douglas v. Green*, to the ADEA.[218] The courts were slower to apply Title VII's disparate impact theory to the ADEA. Although a majority of the circuits eventually did so,[219] dissenting arguments persist. Most recently, concurring in *Hazen Paper Co. v. Biggins*,[220] Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, "[wrote] to underscore" that disparate impact was not an issue in that case. The concurrence then discussed the "substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[221] The support for this claim is Justice Rehnquist's dissent from denial of certiorari in a prior case,[222] a student note in the *Stanford Law Review*,[223] and the dissent in a lower court case.[224]

In 1981, Justice Rehnquist dissented from the denial of

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217. *See supra* text accompanying note 31; Eglit, *supra* note 28, at 1096-1101.

218. 411 U.S. 792, 802 (1973); *see* SCHLEI & GROSSMAN, *supra* note 39, at 497-98.

219. *See* cases cited *supra* note 130.

220. 507 U.S. 604 (1993) (Kennedy, J., concurring).

221. *Id.* at 618.

222. Markham v. Geller, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (Rehnquist, J., dissenting from denial of certiorari).

223. *See* Krop, *supra* note 208.

224. The dissent in Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987) (Easterbrook, J., dissenting), cited in Justice Kennedy's concurrence, was a disparate treatment case. The majority decided that the employer had discriminated. The dissent argued that the majority had reached its conclusion by confusing the disparate impact and disparate treatment theories and questioned whether the employer discriminated even in applying the disparate impact theory. *Id.* at 1216-20. In the explication of its opinion, the dissent questioned in passing whether disparate impact applied at all to ADEA cases. *Id.* at 1220.

certiorari in *Markham v. Geller*.[225] In *Markham*, the lower court ruled that a policy of refusing to hire teachers with more than five years of experience had a disparate impact on teachers over forty. Justice Rehnquist noted that "[t]his Court has never held that proof of discriminatory impact can establish a violation of the ADEA."[226] He insisted that because the policy made no reference to age, it could not violate the ADEA,[227] citing two bases for this conclusion: (1) the first part of the anti-discrimination provision contained in the ADEA, section 4(a)(1), which provides that it is unlawful "to fail or refuse to hire or to discharge any individual" or to discriminate with regard to any term or condition of employment because of age;[228] and (2) the ADEA's defense of "reasonable factors other than age."[229]

Whether the RFOA defense precludes disparate impact is a concern that was discussed above; however, Justice Rehnquist's citation of section 4(a)(1) as support for the proposition that the ADEA permits policies that have a disparate impact was clearly disingenuous. Section 4 (a)(1) of the ADEA prohibits the employer from discriminating in hiring or discharge or terms and conditions of employment on the basis of age.[230] The section is virtually identical to its counterpart in Title VII, section 703(a)(1).[231]

Congress not only prohibited these specific forms of discrimination in both Title VII and the ADEA, but Congress also added section 4(a)(2)[232] as a further provision, borrowed from Title VII's section 703(a)(2),[233] stating that it is also an illegal practice "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment

225. 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (Rehnquist, J., dissenting from denial of certiorari).

226. 451 U.S. at 948 (Rehnquist, J., dissenting).

227. *Id.* at 947.

228. *Id.* (citing 29 U.S.C. § 623(a)(1) (1988)).

229. *Id.* at 949 (citing 29 U.S.C. § 623(f)(1) (1988)).

230. 29 U.S.C. § 623 (a)(1) (1988).

231. *See* 42 U.S.C. § 2000e-2(a)(1) (1988).

232. 29 U.S.C. § 623(a)(2) (1988).

233. *See* 42 U.S.C. § 2000e-2(a)(2) (1988).

opportunities or otherwise adversely affect his status as an employee, because of such individual's age."[234] In *General Electric Co. v. Gilbert*[235] and *Nashville Gas Co. v. Satty*,[236] the Supreme Court first identified section 703(a)(2), the Title VII counterpart to section 4(a)(2), as the statutory basis for the disparate impact theory. The Court had first articulated the disparate impact theory in *Griggs v. Duke Power Co.*,[237] without a statutory reference.[238]

In a later development, the Supreme Court, albeit in a bit of revisionist history, clearly revealed in *Connecticut v. Teal*[239] that section 703(a)(2) had been the basis for the Court's articulation of the disparate impact theory in *Griggs*.[240] Again, it defies logic that virtually the identical provision of the ADEA, section 4(a)(2), does not also prohibit policies that have a disparate impact on people in the protected age group.

The second support for Justice Kennedy's concurrence in *Hazen Paper Co. v. Biggins* was a casenote written in 1982, which is largely outdated, given subsequent changes in the law.[241] The note asserts that the disparate impact theory is not appropriate under the ADEA. One of the reasons the author cites is that Title VII cases should only be authoritative for the ADEA when such cases involve a statutory provision having a counterpart in the ADEA.[242]

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234. 29 U.S.C. § 623(a)(2).

235. 429 U.S. 125, 137 (1976).

236. 434 U.S. 136, 141 (1977).

237. 401 U.S. 424 (1971).

238. *See supra* text accompanying notes 36-39.

239. 457 U.S. 440, 445-46 (1982).

240. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In fact, the Court had not indicated that it was interpreting any particular part of Title VII, but only that the "Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431.

241. Krop, *supra* note 208.

242. Krop, *supra* note 208, at 841-42. At that time, the statutory basis for disparate impact in Title VII had been identified, although, perhaps, only in passing. General Elec. Co. v. Gilbert, 429 U.S. 125, 137 (1976). *See supra* text accompanying notes 234-40. Shortly after the note was written, however, the Supreme Court clearly found statutory support for the disparate impact theory in § 703(a)(2). The note was published in April 1982, before the June 1992

As set forth above, the Supreme Court itself clearly found support for the disparate impact theory for Title VII in the language of section 703(a)(2),[243] which is virtually identical to language found in section 4(a)(2) of the ADEA.[244]

The casenote also argues that *Griggs* proscribed lifelong discrimination, and because these workers have not always been discriminated against, the disparate impact theory should not apply. Inherent in this argument is that age discrimination is not very reprehensible.[245] This is contrary to Congress' findings when it enacted the ADEA.

The justification for the ADEA is set out in the legislation:

> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and otherwise desirable practices may work to the disadvantage of the older person . . .
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and *their employment problems are grave.*[246]

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decision in Connecticut v. Teal, 457 U.S. 440, 445-46 (1982), which explicitly identified the statutory basis for disparate impact.

243. 42 U.S.C. § 2000e-2(a)(2) (1988).

244. 29 U.S.C. § 623(a)(2) (1988).

245. Krop's note also makes the argument that Congress recognized that some generalizations about age were correct, because the ADEA has an upper age limit of seventy. *See* Krop, *supra* note 208, at 850-53. However, Congress subsequently recognized that assuming incapacity at seventy was wrong and amended the Act to eliminate the upper age limit. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3344.

246. 29 U.S.C. § 621(a) (1988) (emphasis added). Two articles detail the

Congress did not consider age discrimination a substantially less serious problem than other kinds of discrimination. Furthermore, the second rationale set out above supports the disparate impact theory in that Congress intended to proscribe practices that were "otherwise desirable practices [that] may work to the disadvantage of older persons."[247] Some commentators have distinguished the need for the disparate impact theory under Title VII as opposed to the ADEA, because race discrimination is motivated by hatred and ill will, while age discrimination is based on stereotyping and ignorance.[248] This does not explain why sex discrimination, which is also largely based on ignorance and stereotyping, is treated the same as race discrimination,[249] and why the disparate impact theory applies without question in Title VII sex discrimination cases.[250] In addition, disparate impact is the only current theory that will detect subconscious discrimination.[251]

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legislative history of the ADEA and seek to ascertain the intent of the Congress with regard to disparate impact. The authors reach opposite conclusions. *See supra* text accompanying notes 194-200.

247. Section 621(a)(2). But see BLUMROSEN, *supra* note 25, at 85-86, for another view of this language.

Some commentators have cited the Supreme Court's decision in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam), for the proposition that age discrimination is not sufficiently heinous to be constitutionally protected. *See* Kaminshine, *supra* note 25, at 306-08. In enacting the ADEA, Congress made a contrary decision that age discrimination has a sufficiently deleterious effect on older people and the economy. 29 U.S.C. § 621 (1988).

248. *See* Krop, *supra* note 208, at 82. Considering the timing of these expressions regarding the ADEA, they may be driven in part by the fact that the overriding concern at the time was race discrimination. Age discrimination at that time largely protected the rights of white males. *See* BLUMROSEN, *supra* note 25, at 105-06.

249. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1988); Anita Cava, *Taking Judicial Notice of Sexual Stereotyping*, 43 ARK. L. REV. 27 (1990).

250. *See* PLAYER ET AL., *supra* note 31, at 251.

251. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (proof of discriminatory intent does not cure the problem of workplace discrimination, which is a by-product of societal discrimination, largely brought about by

Discrimination is treating one person in a protected group differently from a person in another group because of the protected characteristic and has nothing to do with ill will, in the sense of evil motive. The motivation is irrelevant for liability purposes, in any event, whether based on ignorance, stereotyping, unconscious discrimination, inadvertence, or hatred and ill will.[252]

Since *Hazen Paper*, lower courts have continued to apply disparate impact but are less sure of whether it applies.[253] As set out above, disparate impact should logically apply to ADEA cases. It may be more important now that disparate impact be applied to the ADEA, because of the Court's holding in *Hazen Paper* that employers do not violate the ADEA in disparate treatment cases by using criteria that have a disparate impact.[254] As noted above, this

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unconscious discrimination); David B. Oppenheimer, *supra* note 41. Professor Oppenheimer suggests that because most discrimination is unintentional, a better theory of discrimination would be based on negligence, rather than intent. *Id.* at 899. This being the case, the disparate impact theory would more effectively eradicate societal discrimination, including age discrimination. *See also* Blumrosen, *supra* note 145; Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); D. Marvin Jones, *The Death of the Employer: Image, Text, and Title VII*, 45 VAND. L. REV. 349 (1992); Pamela S. Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983); Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733, 759-62 (1987).

252. *See* Judith J. Johnson, *A Standard for Punitive Damages under Title VII*, 46 FLA. L. REV. 521, 534-44 (1994).

253. *See, e.g.*, Leidig v. Honeywell, 850 F. Supp. 796, 801 (D. Minn. 1994); Maidenbaum v. Bally's Park Place, 870 F. Supp. 1254 (D.N.J. 1994), *aff'd*, 67 F.3d 291 (3d Cir. 1995); *see also* Armbruster v. Unisys Corp., 32 F.3d 768, 772 n.4 (3d Cir. 1994); EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641, 648 n.2 (9th Cir. 1992). *Contra* Ellis v. United Airlines, 73 F.3d 999 (10th Cir. 1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995) (holding that RFOA precludes disparate impact under the ADEA); Martincic v. Urban Redevelopment Auth., 844 F. Supp. 1073, 1076-77 (W.D. Pa. 1994) (acknowledging being bound by precedent, court was "convinced [that] disparate impact is not a cognizible claim under the ADEA").

254. In DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir.), *cert. denied*, 116 S. Ct. 306 (1995), the court went into great detail acknowledging the doubt that *Hazen Paper* cast on the disparate impact theory and the validity of

holding has left a gap in the rationale of the ADEA between BFOQ and RFOA, through which all but the most blatant age discrimination will fall. Applying the disparate impact theory to the ADEA, requiring employers to justify by business necessity the use of age-correlated factors, will preserve a rational scheme for the ADEA. However, whether business necessity is the defense to a disparate impact case under ADEA has been questioned.

D. If the Disparate Impact Theory Does Apply to the ADEA, Is the Defense RFOA or Business Necessity?

Before *Hazen Paper*, a majority of the courts of appeal applied the disparate impact model to the ADEA and used the *Griggs* allocation of proof.[255] Under *Griggs*, if the plaintiff proves a prima

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the reasons for not applying the theory to the ADEA. *Id.* at 725-29. The court ultimately refused to apply the disparate impact theory for other reasons. *Id.* at 727; *see also* Lyon v. Ohio Educ. Ass'n & Professional Staff Union, 53 F.3d 135, 140 n.5 (6th Cir. 1995).

In Graffam v. Scott Paper Co., 60 F.3d 809 (unpublished opinion), *available in* No. 95-1046, 1995 WL 414831 (lst Cir. 1995), the court affirmed the lower court's decision that, although the plaintiff showed that the defendant's criteria for layoff affected thirty-nine percent of the employees over fifty and only 9% younger than 50, the criteria "measured skills and job behaviors necessary for, and significantly correlated with, successful performance of the jobs in question." *Id.* at *3. In addition to a footnote citing the doubt *Hazen Paper* cast on the applicability of the disparate impact theory to the ADEA, *id.* at *5 n.1, the court which clarified its interpretation of the law that the employer is not required to validate selection procedures. *Id.* at *5 n.3.

In Stutts v. Sears, Roebuck & Co., 855 F. Supp. 1574, 1578 (N.D. Ala. 1994), the court stated that "the plaintiff has from the outset a heavy burden of persuading the court to find the existence of liability under a theory that the Supreme Court has explicitly stated it has not yet accepted." The court, acknowledging that the policy of reducing benefits impacted older employees more severely, said that such practices that are so "'tenuously related to discrimination, so remote from the objectives of civil rights law, do not reach the prima facie threshold.'" *Id.* at 1579 (citing Finnegan v. Trans World Airlines, 967 F.2d 1161, 1165 (7th Cir. 1992)).

255. Griggs v. Duke Power Co., 401 U.S. 424 (1971); *see supra* text accompanying note 130.

facie case, the employer bears the burden of proving business necessity.[256]

Professor Player was a leading and early proponent of the idea that in a disparate impact case under the ADEA, the defendant does not have to prove business necessity but rather RFOA.[257] Professor Player's assumption, however, was that factors that are "inherently time-based, such as experience, years on the job, and tenure. . . are inherently age-related and thus cannot be considered 'factors other than age.'"[258] Because of the Supreme Court's tacit interpretation of RFOA in *Hazen Paper*, Professor Player's assumption regarding the meaning of RFOA may no longer be valid laws. In any event, few courts have said that RFOA is the defense to disparate impact cases under the ADEA.[259] This defense to disparate impact cases under the ADEA, therefore, has not and should not be generally accepted.

The fact that courts assume that *Burdine-McDonnell Douglas*[260] applies to ADEA pretext cases in the same way that it applies to Title VII provides an argument that the presence of the RFOA

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256. 401 U.S. 424, 431-32 ("If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. . . . Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.).

257. *See* Player, *supra* note 64, at 1278-83.

258. Player, *supra* note 64, at 1278.

259. *See, e.g.*, EEOC v. Newport Mesa Unified Sch. Dist., 893 F. Supp. 927 (D. Cal. 1995). In *Newport Mesa* the charging party was not hired, because her experience entitled her to a greater salary than the person hired. *Id.* at 929. The court determined that the defense to disparate impact cases under the ADEA was RFOA, and that the policy of hiring based on salary costs is an RFOA. The court ruled the employer could not use such a policy if it was a proxy or pretext for age discrimination. *Id.* at 932. The court rejected the argument that RFOA should be construed the same as business necessity, saying that RFOA required less of a showing. The employer's justification for the policy was its need to reduce costs, and the court determined this to be an RFOA. *Id.* The EEOC tried to show that there was a less discriminatory alternative, that the charging party would take a lower salary, but the court said this would violate the seniority system under the collective bargaining agreement. *Id.* at 933.

260. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonald Douglas Corp. v. Green, 411 U.S. 792 (1973).

defense is not an impediment to applying the defense of business necessity to disparate impact cases under the ADEA.[261] Early on, the Supreme Court allowed the employer to escape liability by articulating a legitimate, nondiscriminatory reason in a disparate treatment case under Title VII.[262] Despite the presence of the RFOA defense in the ADEA, the courts have applied the judicially created defense of legitimate, non-discriminatory reason to ADEA disparate treatment cases. Business necessity was also judicially created as a defense to disparate impact cases under Title VII.[263] Analogously to disparate treatment, the presence of the defense of RFOA in the ADEA should not be an impediment to using business necessity as the defense for disparate impact. In fact, now that the Supreme Court has apparently equated RFOA with legitimate, nondiscriminatory reason, it could be argued that RFOA applies only in the context in which legitimate, non-discriminatory reason would apply: disparate treatment cases.[264]

If the Court determines that RFOA is the defense to disparate impact under the ADEA, the decision in *Hazen Paper* may have foreclosed the argument that disparate impact applies to the ADEA. Before *Hazen Paper*, an argument could be made that RFOA at least *allowed* the use of disparate impact. If the employer used a factor that had a disparate impact on the protected age group, the employer was justified in using it if he could show that he had a reasonable basis for doing so. After *Hazen Paper*, the argument may cogently be made that *any* factor other age, no matter how strongly correlated with age, is an RFOA.[265] Obviously there is no room for

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261. *See* Eglit, *supra* note 30, at 198-205.

262. *See* Eglit, *supra* note 30, at 198-205.

263. Congress has recognized the disparate impact theory in Title VII cases by amending Title VII to specifically include cases of disparate impact. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988), *as amended by* Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k) (1988 & Supp. 1993).

264. Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).

265. *Id.* at 611. The Court noted, however, that its decision should not be read to allow the use of factors that are merely pretextual. *Id.* at 613. Presumably, determinations based upon factors that are perfectly correlated with age do not qualify as reasonable factors other than age. At least one circuit has so held.

the disparate impact model if the defense to disparate impact is RFOA as interpreted by *Hazen Paper*.

Congress did not intend, and before *Hazen Paper* the lower courts overwhelmingly agreed, that employers should be able to rely on factors that strongly correlate with age without justifying them in some way.[266] As Professor Player reasoned, RFOA should be the defense, but only if it were interpreted to exclude factors that are inherently age-related.[267] Because the Supreme Court may have foreclosed this interpretation, the question remains of how the ADEA can be rehabilitated.

VI. SOLUTION

To interpret "reasonable factors other than age" to mean "*any* factor other than age" eliminates the term reasonable from the legislation and allows all but the most obvious age discrimination, in contravention of sound statutory construction, obvious congressional policy, and the view that prevailed in circuit and district courts before *Hazen Paper*.[268] Thus, at the least, the Court should limit its holding in *Hazen Paper* to mean only that while the use of an age-correlated factor is not discriminatory per se, it does require justification. Other solutions – those which do more than contain the spread of damage to the statutory scheme – require congressional action, which is unlikely.[269] Thus, perhaps the most

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Johnson v. New York, 49 F.3d 75 (2d Cir. 1995); *see supra* text accompanying note 122.

266. *See* discussion *supra* part IV.B.

267. *See supra* text accompanying notes 257-58.

268. Before *Hazen Paper*, the overwhelming majority of lower courts held that the use of age-correlated criteria always required justification. *See supra* note 105. The Court's interpretation of RFOA is also inconsistent with RFOA's counterpart in the Equal Pay Act, "any factor other than sex." Most courts interpret this factor to be reasonable, not just *any* factor other than sex. *See supra* text accompanying notes 90-101.

269. Congress is dominated by Republicans who have "contracted with America" to decrease government regulation of business. A.M. Rosenthal, *American Class Struggle. Contract with America Turning Out to Be More Than*

productive discussion focuses on how lower courts should interpret the ADEA after *Hazen Paper* in both disparate treatment and disparate impact cases.

A. Disparate Treatment

Rather than limit *Hazen Paper* to its holding, many lower courts are giving it an unduly expansive reading. Lower courts are not only treating age-correlated factors as insufficient evidence of discrimination but are granting summary judgment in favor of the defendant, even in the face of other evidence of pretext.[270] Yet the use of an age-correlated criterion – while not dispositive of the issue of intentional discrimination after *Hazen Paper* – should be considered serious, not insignificant, evidence that discrimination did occur. Treating such evidence as insignificant[271] carries *Hazen Paper* too far. The Court has ruled only that the use of age-correlated factors standing alone does not constitute intentional discrimination and indicated that in the absence of proof of pretext such factors are a sufficient defense. The Court did not rule that age-correlated factors do not constitute evidence of discrimination.[272] In fact, a factor strongly correlated with age, plus *any* other evidence of pretext, should suffice to constitute a prima facie case and defeat a motion for summary judgment in favor of the

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Those That Voted for It Expected, N.Y. TIMES, Mar. 21, 1995, at A15. Congress could, for instance, specify that RFOA is an affirmative defense that requires the employer to bear the burden of persuasion that the use of any age-correlated factor is justified by business necessity. Alternatively, Congress could amend the ADEA to codify the disparate impact model, as in the 1991 amendments to Title VII.

Whether the Court will repudiate its language in *Hazen Paper* and require the employer to justify the use of an age-correlated criterion is also improbable, because *Hazen Paper* was a unanimous decision. *Hazen Paper*, 507 U.S. 604.

270. *See supra* text accompanying note 114.

271. *Id.* In Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977), and Washington v. Davis, 426 U.S. 229, 241-42 (1976), the Supreme Court ruled that a showing of disparate impact, while not sufficient in itself, is evidence of intentional discrimination.

272. *See supra* text accompanying notes 66-85.

defendant.[273]

Indeed, if the correlation to age is strong and there is some evidence of pretext, the burden of persuasion should shift to the defendant. This interpretation of RFOA is strongly supported by the Equal Pay Act's defense of "any other factor other than sex," which likely served as the model for RFOA. Under the Equal Pay Act, "any other factor other than sex" is an affirmative defense, while under the ADEA, RFOA may be treated differently.[274] If this approach were adopted for the ADEA, once the plaintiff proves that the employer has used a factor that correlates strongly with age and provides any other evidence that the criterion is a pretext for discrimination, the employer would bear the burden of justifying the use of the age-correlated factor.[275]

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273. *Cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

274. *See* Eglit, *supra* note 30, at 192-96, 210-17.

275. *See* Gregory, *supra* note 77. Mr. Gregory also stated that the employer should bear the burden of persuasion to justify using an age-correlated criterion. He did not think that the Supreme Court required, in addition, proof of pretext in *Hazen Paper.* At present, the employee bears the burden of persuasion throughout the usual ADEA case. *See supra* text accompanying notes 48-49. The Supreme Court did not discuss burdens of persuasion in *Hazen Paper*, 507 U.S. 604 (1993).

In a Title VII case that applies as well to the ADEA, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (superseded in part by statute), *see supra* note 56, the Supreme Court ruled that if the plaintiff presents sufficient evidence that the employer was motivated in part by discrimination, the burden of persuasion shifts to the defendant to prove that legal motivations predominated. 490 U.S. at 244-45. In an ADEA case, if the plaintiff proves that the employer used an age-correlated criterion and presents other evidence that the criterion was a pretext for discrimination, the burden of persuasion should shift to the defendant. In *Price Waterhouse* a four-Justice plurality of the Supreme Court opined that the burden of persuasion shifts to the defendant when the plaintiff proves that a protected characteristic was a motivating factor in the decision in an adverse employment action. *Id.* at 244. The plurality in *Price Waterhouse* did not specify what kind of evidence shifts the burden of persuasion, although the case involved direct evidence. The dissent questioned, however, whether only direct evidence was sufficient to shift the burden of persuasion. *Id.* at 286-93 (Kennedy, J., dissenting). Although no majority opinion was entered in *Price Waterhouse*, the decision resulted in direct precedent because the four justices of the plurality (Brennan, Marshall, Blackmun, and Stevens), as well as two individually

The question arises as to when a factor is sufficiently correlated with age to justify imposing the burden of persuasion on the defendant. The burden of persuasion certainly should shift to the employer to justify the use of the age-correlated factors that are historically associated with age, such as seniority, higher salary, tenure, experience, and years of service, assuming that the plaintiff can produce *any* evidence of pretext, such as the plaintiff's replacement by a substantially younger person.

For other factors that correlate with age in the employer's particular workforce, the plaintiff could provide the necessary correlation by proving a case that is analogous to a pattern and practice suit under Title VII.[276] To determine whether a factor is strongly correlated with age, the courts can borrow the disparate impact formulation of whether a criterion has a statistically significant effect on a protected group, so that the impact cannot be said to have happened by chance.[277] As discussed earlier, the four-fifths rule or the two to three standard deviations rule should provide a sufficiently strong correlation.[278] The courts can use the idea of a gross statistical disparity to indicate a sufficiently strong correlation to shift the burden of persuasion, with less evidence of pretext. In other words, a statistically significant disparity with strong evidence of pretext would be sufficient to shift the burden of persuasion in some cases, while a gross statistical disparity, along

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concurring justices (White and O'Connor) all agreed that the defendant employer should bear the burden of proving that although its employment decision was based in part on an unlawful motive, it would have reached the same result considering only legitimate factors. *Id.* at 244-48, 258-61, 261-79. The issue is moot for Title VII cases, because the 1991 Civil Rights Act superseded *Price Waterhouse* for Title VII cases. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.). *See supra* text accompanying notes 55-58. As discussed earlier, *see supra* text accompanying note 59, Congress did not amend the ADEA in this regard, and *Price Waterhouse* in all probability applies to the ADEA. *See* Eglit, *supra* note 28, at 1153-58.

276. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).

277. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 310 (1977).

278. *See supra* text accompanying notes 137-46.

with less evidence of pretext, would be sufficient in others.[279]

Although in theory the use of age-correlated factors alone should be enough to require the employer to prove that use of the factor was justified,[280] the Supreme Court in *Hazen Paper* reasoned that unjustified use of an age-correlated criterion does not violate the ADEA, absent proof of pretext.[281] In addition, the Court ruled that an age-correlated factor could serve as a factor other than age or a legitimate non-discriminatory reason, absent evidence of pretext.[282] Consequently, an age-correlated criterion alone would be insufficient to shift the burden of persuasion to the employer; pretext must also be shown.

Thus, the employer should bear the burden of proof and persuasion to justify the use of the age-correlated criterion and to refute the evidence of pretext. The employer should be required, however, to justify a policy that impacts older workers on some basis other than general cost saving. Additional proof should be required showing that the employer had a basis for burdening a class of older workers.[283] Professor Kaminshine's approach would

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279. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (prima facie case was based on plaintiffs' showing that the company hired virtually no black or Hispanic over-the-road truckdrivers, in addition to anecdotal evidence of intentional discrimination).

280. Professor Howard Eglit has contended that RFOA should be an affirmative defense in some but not all situations. When the plaintiff is attempting to prove a *Burdine-McDonnell Douglas* circumstantial evidence case, the burden of persuasion would remain on the plaintiff at all times. *See* Eglit, *supra* note 30, at 219-26. RFOA, however, should be an affirmative defense in pattern and practice and direct evidence cases. In addition, RFOA should be equated, in Eglit's view, with business necessity in disparate impact cases. Professor Eglit wrote his article before *Wards Cove* and *Hazen Paper* were decided, so his interpretation that RFOA/ business necesssity would be an affirmative defense in disparate impact cases must be reconsidered as set forth below. *See infra* text accompanying notes 287-97.

281. 507 U.S. at 610.

282. *Id.* at 611.

283. *Cf.* EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984) (requiring the employer to prove that burdening the class of people over 55 was the least detrimental alternative).

be a helpful addition to the defense of RFOA at this point.[284] If the employer were attempting to justify the use of an age-correlated criterion, such as high salary, as a cost saving, the employer would be required to show that the saving significantly serves the employer's goals. In addition, the employer would be required to justify more specifically the impact on higher salaried employees.[285] This solution comports as well with the interpretations of the Equal Pay Act's defense of "any other factor other than sex," which, as discussed above, usually requires the employer to produce a business reason for impacting a class based on sex.[286]

B. Disparate Impact

Before *Hazen Paper*, most courts recognized disparate impact actions under the ADEA, using business necessity as the defense.[287] This interpretation allows the scheme of the ADEA to be carried out: Discrimination that correlates with age would be prohibited unless the employer could prove that it had a reasonable basis for imposing the age-correlated criterion.

Requiring plaintiffs to challenge the use of age-related criteria through the vehicle of a disparate impact claim raises several problems.[288] One of the most obvious problems is that the number

284. Kaminshine, *supra* note 25, at 279-83.

285. Kaminshine, *supra* note 25, at 280-81; EEOC v. Insurance Co., 49 F.3d 1418 (9th Cir. 1995). *See supra* note 116 for the facts of *EEOC v. Insurance Co.*

286. *See supra* text accompanying notes 96-101.

287. *See supra* text accompanying note 130.

288. Some are problems that all disparate impact suits have after *Wards Cove*, some of which are perpetuated by the 1991 Act. Leidig v. Honeywell, 850 F. Supp. 796 (D. Minn. 1994), is typical. In *Leidig*, the plaintiff showed that after layoff, 30% of the employees over 50 remained, while 70% of the employees under 50 were employed. *Id.* at 802. The court determined that the plaintiff did not prove a prima facie case, because he did not produce evidence of statistical significance. Also, he did not show causation, because he did not show that the challenged criterion, flexibility, caused the impact. Furthermore, he did not explain why a comparison of persons over 50 to persons under 50 was relevant to the reduction-in-force. Finally, the plaintiff failed to eliminate nondiscriminatory explanations such as retirement. *Id.* The court also expressed

of people affected has to be sufficiently large in order to be statistically significant.[289] *Wards Cove*[290] exacerbated this problem by requiring the plaintiff to prove causation, that is, that a particular criterion has a disparate impact. This means that in order to be statistically significant, one criterion would have to have had a disparate impact on a fairly large number of people.[291]

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concern that the plaintiff used persons over 50 instead of persons over 40. *Id.* at 803 n.7. Clearly, after *Wards Cove*, getting past the prima facie case stage will be difficult.

As confirmation of the problems of proving a disparate impact case under the ADEA, one commentator's research revealed that as of the date of his research only two disparate impact cases under the ADEA had ever been successful. *See* Sloan, *supra* note 19, at 520.

289. *See* SCHLEI & GROSSMAN, *supra* note 39, at 1375-76; *see, e.g.*, Maidenbaum v. Bally's Park Place, 870 F. Supp. 1254, (D.N.J. 1994) (sample size of 16 was insufficient to find disparate impact), *aff'd*, 67 F.3d 291 (3d Cir. 1995). It should be noted that this part of the Article is contemplating an individual case of disparate impact, not a class action, which would present other problems for the ADEA plaintiff. *See supra* note 61.

290. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

291. *See* SCHLEI & GROSSMAN, *supra* note 39, at 101-02; Armbruster v. Unisys Corp., 1996 WL 55659 (E.D. Pa. 1996) (granting summary judgment based on plaintiff's failure to identify in a timely manner criterion causing the disparate impact). This problem exists for Title VII, as well, because the Civil Rights Act of 1991 did not change the prima facie case problem of *Wards Cove*, which requires the plaintiff to pick out the criterion causing the disparate impact. *See supra* text accompanying notes 143-44. The 1991 Act does require the defendant to bear the burden of persuasion once the plaintiff gets past this stage, while *Wards Cove* does not. 42 U.S.C. § 2000E-2(K)(1)(A) (Supp. V. 1993).

An additional problem is whether the plaintiff can prove disparate impact by showing, for example, that a criterion impacts persons 55 and older or whether the plaintiff has to prove that the criterion has a disparate impact on persons over 40. *Compare* Finch v. Hercules Inc., 865 F. Supp. 1104, 1129 (D. Dela. 1994) ("[F]ailure to accord protection to subsets of the protected class would allow an employer to adopt facially neutral policies which had a profoundly disparate impact on individuals over age 50 or 55, so long as persons under age 50 or 55 received sufficiently favorable treatment that the adverse impact on individuals over 40 was minimal."), *with* Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1371, 1373 (2d Cir. 1989) (contending that dividing up the protected class bypasses the plain language of the ADEA, which protects the entire class of persons between 40 and 70).

At least one court has indicated that courts should not apply such strict standards to these statistics.[292] Another solution is to allow such criteria as salary, seniority, and tenure, which commonly are age-correlated, to be presumptively prima facie proof of disparate impact, because they would impact the general population in such a way.[293]

As *Wards Cove* indicated, the defendant at this point must articulate that the criterion significantly serves the employer's employment goals.[294] Although the employer bears the burden of production and not persuasion,[295] as opposed to the recommendation set forth above for disparate treatment cases, the type of proof required to justify an age-correlated factor in a disparate impact case should be the same as the type of proof recommended above for justifying such a factor in a disparate treatment case. The employer must show not only that the use of the age-related criterion was significantly related to its employment goals but also that it had an articulable reason for burdening the class of older employees.[296] If the courts choose to apply a lower standard of business necessity at this point, which would allow a general goal such as cost saving to be a business necessity, without more, the employee could still win by showing other alternatives to saving money without impacting the protected class.[297]

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292. Finch v. Hercules Inc., 865 F. Supp. 1104, 1122 (D. Dela. 1994).

293. *See* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) ("There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants.").

294. *Wards Cove*, 490 U.S. at 659.

295. *Id.*

296. *See supra* text accompanying notes 283-86. In a disparate impact case, the employer usually would have no evidence of pretext to refute, because the employee's prima facie case does not require a showing that the criterion is a pretext for intentional discrimination. *See supra* text accompanying note 38.

297. If the employer were able to justify the criterion, Professor Kaminshine suggests less discriminatory alternatives, including salary reduction. Kaminshine, *supra* note 25, at 283-84. Although a salary reduction would seem to violate that Act as well, if the Court's interpretation of the ADEA allows older employees to be fired because of high salaries, a salary reduction could be similarly justified. *See id.* at 284. Obviously, the employer's objection would be that lowering salary

VII. CONCLUSION

We have reached the time when a court can characterize the employer's avowed preference for a "'younger and cheaper' engineer" and its decision "'to get rid of the older employees with the higher salaries,'" as "primarily indicative of a desire to save money by employing persons at lower pay," which requires no justification.[298] Employers should have to justify the use of age-correlated criteria. The most obvious and reasonable interpretation of the ADEA is that this justification should be an affirmative defense in which the employer must justify the use of any age-correlated criterion as a reasonable – not just *any* – factor other than age. After *Hazen Paper*, however, the employer in a disparate treatment case should at least bear the burden of persuasion if the employee can produce other evidence of intentional discrimination.

If the Court ultimately decides that RFOA means *any* factor other than age, it is at best an imperfect solution to fall back on the disparate impact theory alone to repair the damage done to the ADEA. If the Court ultimately decides, in addition, that disparate impact does not apply to the ADEA, the employer's ability to rid his workforce of older workers will be virtually unlimited.

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would lead to poor employee morale and, thus, would not be equally as effective as required by *Wards Cove*. *See supra* text accompanying notes 169-73.

The problem is this: "most older employees (who have difficulty getting new jobs) would prefer a wage reduction to being fired, and many employers, knowing of the morale problems created by wage cuts, would prefer to terminate older employees rather than have them remain at work with their morale in serious disarray because their pay was reduced." Metz v. Transit Mix, Inc., 828 F.2d 1202, 1210 (7th Cir. 1987), *overruled by* Anderson v. Baxter HealthCare Corp., 13 F.3d 1120 (7th Cir. 1994).

298. Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1218 (5th Cir. 1995). For other similar cases, see cases cited *supra* note 54.